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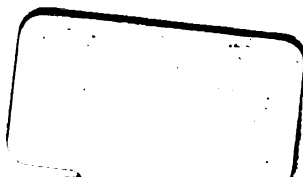


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IRISH COMMON LAW REPORTS.

REPORTS OF CASES

ARGUED AND DETERMINED IN THE COURTS OF

QUEEN'S BENCH, COMMON PLEAS,

EXCHEQUER,

EXCHEQUER CHAMBER, AND COURT OF CRIMINAL APPEAL,

DURING THE YEARS 1849, 1850 AND 1851.

Queen's Bench:

By JOHN S. ARMSTRONG, Esq. AND W. H. FALON, Esq.

Common Pleas:

By HEWITT POOLE JELLETT, Esq.

Exchequer:

By GRAVES CATHREW, Esq. AND J. P. HAMILTON, Esq.

Exchequer Chamber:

By JOHN S. ARMSTRONG, Esq.

Court of Criminal Appeal:

By JOHN S. ARMSTRONG, Esq. AND W. H. FALON, Esq.

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1852.



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JUDGES AND LAW OFFICERS

During the period of these Reports.

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Lord Chief Justice.—The Right Hon. FRANCIS BLACKBURNE.

Second Justice.—The Hon. PHILIP CECIL CRAMPTON.

Third Justice.—The Right Hon. LOUIS PERRIN.

Fourth Justice.—The Right Hon. RICHARD MOORE.

COURT OF COMMON PLEAS.

Lord Chief Justice.—The Right Hon. JAMES HENRY MONAHAN.

Second Justice.—The Hon. ROBERT TORRENS.

Third Justice.—The Right Hon. NICHOLAS BALL.

Fourth Justice.—The Hon. JOSEPH DEVONSHIRE JACKSON.

COURT OF EXCHEQUER.

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JOHN HOWLEY, Q. C.

JAMES O'BRIEN, Q. C.

JONATHAN CHRISTIAN, Q. C.

NOTE.—The changes which took place in the Judges and Law Officers during the period of these Reports were as follows:—In the Vacation after Trinity Term 1850 The Right Hon. JOHN DOHERTY, Chief Justice of the Common Pleas, died, upon which the Right Hon. JAMES HENRY MONAHAN, Her Majesty's Attorney-General, was appointed in his place, and JOHN HATCHELL, Esq., Q. C., Attorney-General, and HENRY GEORGE HUGHES, Esq., Q. C., Solicitor-General. In Trinity Term 1851 Serjeant STOCK resigned, and JONATHAN CHRISTIAN, Q. C., was appointed in his place.

CORRIGENDA.

- Page 17, line 7 from top, for "these" read "there."
,, 17, line 10 from top, before "appears" insert "it."
,, 36, line 2 from top, before "bound" insert "not."
,, 52, marginal note, for "notice" read "evidence."
,, 53, line 10 from bottom, for "12th" read "1st."
,, 54, line 21 from top, for "12th" read "1st."
,, 54, line 31 from top, for "12th" read "1st."
,, 71, line 6 from top, for "c. 2" read "c. 78."
,, 325, line 9 from top, for "Stephens" read "Stephen."
,, 337, first line, for "plaintiff" read "defendant."
,, 343, line 2 from bottom, for "section" read "order."
,, 386, last line, for "nor" read "we."
,, 412, in reference "Sty. 292" dele "Lord Lyndhurst in note."
,, 429, line 5 from bottom, for "Lords" read "Commons."
,, 434, line 5 from bottom, for "according" read "acceding."
,, 579, line 5 from bottom, for "proof of sufficient" read "sufficient proof."
,, 591, line 13 from top, for "plaintiff excepted" read "defendant excepted."

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 OF CASES ARGUED AND DETERMINED IN
 THE COURTS OF
 QUEEN'S BENCH, COMMON PLEAS, EXCHEQUER,
 Exchequer Chamber
 AND
 COURT OF CRIMINAL APPEAL.

W. J. DOYLE and another v. JOHN CALLANAN.

(*Queen's Bench.*)

M. T. 1850.
 Nov. 19.

REYNOLDS, on behalf of the defendant, moved to set aside the writ of summons in this cause and the copy thereof as served, also the service thereof and the declaration filed thereon, on the ground of irregularity, the writ of summons and the copy thereof as so served (or the copy so served) and the declaration being irregular, inasmuch as the writ of summons and the copy so served (or said copy so served) required the defendant to cause an appearance to be entered in this Court in an action of debt, whereas the declaration was in an action of trespass on the case on promises and for the costs of the motion.

The motion was grounded on the writ of summons, which the plaintiffs' attorney was by notice required to produce in Court, the copy thereof as served, and the declaration.

The declaration, which was in assumpsit, was filed on the 2nd of November 1850, and notice thereof given, and a copy furnished

A writ of summons required the defendant to cause an appearance to be entered for him in an action of debt, and the declaration grounded thereon was in assumpsit. *Held*, that this was an irregularity, and the proceedings would be set aside on motion; but that the irregularity was waived by the defendant having taken a step in the cause.

M. T. 1850. the same day, and the rule to plead was served on the 5th of
Queen's Bench November.

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CALLANAN. The declaration contained the common counts for goods sold and delivered, and the money counts.

The plaintiffs residing out of the jurisdiction, on the 6th of November a notice requiring attendance before the Master to measure security for costs was served on plaintiffs' attorney, and notice of the present motion was served on the 11th of November. The writ of summons required the defendant to "cause an appearance to be entered for him in our Court of Q. B. at Dublin, in an action of debt at the suit of," &c.

This is a clear irregularity, the writ being in debt and the declaration in assumpsit: *Moore v. Forster* (a). The writ in that case was in debt, the declaration substantially in assumpsit; and Wilde, C. J., says:—"As therefore the first count may be, and the second is, a good count in assumpsit, I think we are justified, as against the plaintiff, in saying that the whole is a good declaration in assumpsit, and, as it is inconsistent with the process, must be set aside."—[BLACKBURNE, C. J. Is there any difference between the English and Irish Acts as to the writ?]
 —None, except in the schedule to the English Act the form of summons differs. *Thompson v. Dicus* (b); the writ there was in trespass, and the declaration trespass on the case, and the Court set it aside for irregularity.

J. H. Orpen, contra.

This application is too late: *Hinton v. Stevens* (c). There it was held that an objection to a notice of declaration on the ground of variance from the writ must be taken within four days from the time of serving the notice; here it was not until nine days after the declaration was served that this notice of motion was served. *Chubb v. Nicholson* (d); *Golding v. Scarborough* (e). In that case the *capias* was an action on promises, and the declaration was in debt, and an application to set aside the declaration for irregularity was

(a) 5 Com. B. 220.

(b) 2 Dowl. P. C. 93.

(c) 4 Dowl. P. C. 263.

(d) 1 Har. & Wol. 666.

(e) 2 Har. & Wol. 94.

held too late, as four days had elapsed since the declaration was delivered, and this too, though the defendant's attorney was changed: *Fynn v. Kemp* (a); *Edwards v. Collins* (b). M. T. 1850.
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Further, the defendant has waived any irregularity, because he has taken a step by an application for security for costs; and as to the costs of this motion, the plaintiffs must necessarily have them, because the notice here is too large, inasmuch as it appears the writ is quite regular, and yet they seek to set it aside and service thereof as well as the declaration: *Cox v. Bucknell* (c).

*Per Curiam.**

The defendant has waived the irregularity complained of by taking a step in the matter, and the motion must be refused, with costs.

(a) 2 Dowl. P. C. 620.

(b) 5 Dow. P. C. 227.

(c) 5 B. & Ald. 892.

* The CHIEF JUSTICE and MOORE, J.

NOTE.—In *Rollon v. Jeffery* (2 Dow. P. C. 637), where the writ was in debt, and the declaration was partly in debt and partly in assumpsit, the Court refused to set them aside as being irregular, but left the party to demur.

CRANSTONS and another v. FITZGERALD.

Nov. 19.

COSBY, on behalf of the plaintiffs, moved that the appearance in this cause entered for the defendant be set aside, inasmuch as the defendant was an outlaw.

The defendant in 1846 became liable on his promissory note to William Cranston, one of the plaintiffs, and he being unable to have

Where a defendant had been outlawed and an order had been made on the application of the plaintiffs to substitute service of a

writ of summons on him by serving his agent; *Held*, that the defendant having entered an appearance to the writ so substituted, was entitled so to do, notwithstanding the judgment of outlawry was unreversed.

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him served with any writ or process, judgment of outlawry was had against him on the 30th of May 1849, on foot of this promissory note. The present action was brought for recovery of the amount of the promissory note which had been indorsed to the plaintiffs, who were co-partners, and of other debts due by the defendant to the plaintiffs. Service of the writ of summons on the manager and agent of the defendant, who resided out of the jurisdiction, was substituted, and an appearance by an attorney was entered for him on the 11th of July 1850. This motion is made for the purpose of compelling the defendant to reverse his outlawry, which he may do on motion, but the Court will impose the terms on him of appearing to the action and paying the costs of the outlawry proceedings. An outlaw has no *locus standi* in any Court for his own benefit except for the purpose of reversing his outlawry.—[BLACKBURN, C. J. You have invested him with the power of which you seek to deprive him by serving him with a writ requiring his appearance.—MOORE, J. His appearance has been induced by your own acts, why then should he be deprived of the benefit?—The judgment of outlawry is a judgment for the Queen, "that the defendant be outlawed," and the disability caused by such judgment cannot be removed but by the reversal of the judgment. It is not sought to deprive the defendant of the power of appearing, but to compel him to remove the impediment to his appearance. The very exigency of the writ of summons, commanding his appearance in the Queen's Court, requires that he should appear cleared of the contempt. In 2 *Lush's Practice*, p. 683, it is stated that an outlaw is incapable of defending an action. In *Loukes v. Holbench* (a) it was held that a party outlawed in the King's Bench, in an action to recover the arrears of an annuity, could not be heard in the Common Pleas on a motion to set aside the deed of annuity; in that case Parke, J., delivered the judgment of the Court, and adopted the principle and language of the Judges in the case of *Griffith v. Middleton* (b), that a person outlawed is not receivable to sue in any Court unless it be to reverse his own outlawry; for it was said that when it is *ad lucrandum* there ought to

(a) 4 Bing. 419.

(b) Cro. Jac. 425.

be ability in the person, and it is all one to gain by way of *discharge* as by way of *perquisition*. An outlaw cannot appear in Court for any purpose but to reverse his outlawry: *Aldridge v. Buller* (a); and to this rule there are but these exceptions: He may sue or defend *in auter droit*, or may be a competent witness, or he may apply for his discharge under the Insolvent Debtors' Act, and may appear in Court also for the purpose of applying for his discharge from custody when the writ or power of the Court has been abused, or irregularly used against his person: *Hawkins v. Hall* (b); *Walther v. Thelluson* (c); *Davis v. Trevanion* (d). An outlaw cannot for his own benefit move to have a bill of costs taxed: *In re Ford* (e); even when acting in a representative capacity, if he appear to be personally interested in the matter: *In re Mander* (f). There the judgment of outlawry was sued out by third parties.

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J. H. Orpen, contra.

This motion is quite irregular. Here a writ issues at suit of the plaintiffs requiring the defendant to appear at a certain time, and he does appear according to its exigency; what more is required? It is a motion to the discretion of the Court, and there is no precedent for the present application. The plaintiffs might perhaps have replied the outlawry. The distinction taken in all the cases cited is that the outlawed person is not merely entitled to protect himself from arrest, but that he is also entitled to come into Court and defend himself like any other person, but that he cannot come into Court seeking a benefit for himself until the outlawry be removed: *Bac. Ab. tit. Outlawry*, D. A party in contempt is entitled to appear and resist any proceedings taken against him: *King v. Bryant* (g). —[BLACKBURNE, C. J. Is there any precedent of a replication of outlawry to a plea in bar?—MOORE, J. An outlaw may defend an action; and here the plaintiffs have actually obtained an order of the Court, substituting service on the defendant's agent.]

(a) 2 M. & W. 412.

(b) 1 Beav. 73.

(c) 1 Dowl. N. S. 277, 578.

(d) 2 Dowl. & L. 743.

(e) 10 Jur. 757.

(f) 6 Q. B. 867.

(g) 3 Myl. & Cr. 195.

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Orpen was stopped and—

Cosby replied.

The judgment of outlawry is simply that the defendant be outlawed, and it matters not for what or by whom that judgment has been sued. It is in the power of an outlaw to reverse his outlawry on motion and enter an appearance for himself, and he cannot appear until after such reversal. Even in bringing a writ of error, the error cannot be suggested by the outlaw himself, but by an *amicus Curie*. There is no instance of a replication of outlawry; for if an outlaw could not appear, it follows that he could not plead. In *Hawkins v. Hall* the proceeding was a penal one; the defendant was in custody and the process of the Court had been abused, and Lord Langdale held that the outlaw might apply to the Court for his personal protection when he had been improperly detained. Here the defendant by his appearance seeks a gain for his own benefit by way of discharge.

BLACKBURN, C. J.

This motion is of an extraordinary character and must be refused. It is certainly one to the discretion of the Court; but are we on motion to set aside this appearance? it being entered actually on the compulsion of the plaintiffs themselves. It is in fact an endeavour to get rid of this appearance, which the plaintiffs have compelled the defendant to enter, and thereby to preclude him making any defence to which he is entitled.

Motion refused, with costs.

M. T. 1850.
Queen's Bench

HENRY LUTTRELL v. THOMAS M'CREERY.

June 7.
 Nov. 5, 22.

COVENANT for non-payment of rent.—The declaration stated that the Earl of Carhampton, being seised in fee of certain premises, by indenture of the 19th of May 1792, bargained and sold the same, with the appurtenances, to one William Drought for one year, who, by virtue of said indenture and of the statute for transferring uses into possession, became possessed thereof; that the Earl of Carhampton, being seised of the reversion of the said premises, on the 10th of May 1792, released and confirmed unto William Drought, his heirs and assigns, the said premises: To hold the same from the 25th of March 1792, for the lives of M. D., D. F. and J. M., and the survivors and survivor of them (with a covenant for perpetual renewal), yielding and paying the yearly rent of £40. That William Drought did thereby, for himself, his heirs, executors, administrators and assigns, covenant to pay the rent to the Earl of Carhampton, and that the Earl of Carhampton did, for himself, his heirs, &c., covenant with William Drought that upon the death of any of the

A declaration stated an indenture of 1792, which contained a covenant for renewal on the death of the *cestui que vies* and the survivors of them on payment of a peppercorn fine, and that the nominated life was to be indorsed on the indenture or on a separate deed, label or parchment. It then alleged the death of one of the *c. q. vies*, and that by an indenture of 1818, under the hand and seal of plaintiff and defend-

ant, reciting the indenture of 1792, and that all the estate and interest of the lessor in that lease vested in plaintiff, and the estate of the lessee in the defendant, and that the defendant had applied for a renewal of the indenture of 1792 by inserting the life of D., and that plaintiff, in pursuance of that covenant, added and inserted said life, *Habendum* for the three lives and the survivor, and such other life, &c., "subject to the rent and all the other covenants in the indenture of 1792 contained on the lessee's part to be done and performed."

The declaration then averred a covenant by the defendant to pay the rent, the existence of the term, and that the rent accrued due, and non-payment. The defendant cravedoyer and pleaded that before the rent became due the defendant, by an indenture therein mentioned, assigned his interest in the premises; that the assignee entered, and that the plaintiff after the entry received rent from the assignee and accepted him as his tenant.

Held, on general demurrer, that such plea was bad, the reference by the deed of 1818 to the deed of 1792 incorporating all the covenants in the deed of 1792, and the deed of 1818 containing the words "subject to the said yearly rent of £40 sterling," raised an express covenant to pay the rent, and that such covenant was obligatory on the defendant after his assignment over.—[CRAMPTON, J., *dissentiente*.]

A covenant for renewal means that the tenant is to have at all times a subsisting legal estate for three lives and the life of the survivor, and that the landlord is to have all his legal remedies for the recovery of the rent.—*Per* MOORE, J.

Held, *per* CRAMPTON, J., that no new estate was, or intended to be, created by the deed of 1818; that the intention was to continue the old estate by way of enlargement, and leave the relation of landlord and tenant as it stood before.

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lives, on payment of a peppercorn fine, he would add and insert to the time and term thereby granted the life of such person as might be named, which nominated life was to be indorsed on the indenture or written on a deed, label or parchment, to be affixed to the indenture, or in a separate deed or writing, declaring the life or lives failing, and the life and lives so added in lieu thereof (*Profert*).

It then stated that during the existence of two of the lives the third one dropped on the 1st of April 1818, and that on the 21st of April 1818, by indenture made between plaintiff and defendant (*Profert*), reciting that the estate and interest of the Earl of Carhampton in the premises was legally vested in the plaintiff, and that the estate and interest of William Drought was vested in the defendant, and that J. M., one of the lives in the indenture of the 10th of May 1792, was dead, and that defendant had applied for a renewal thereof by inserting the life of the Duke of Leinster; that he (the plaintiff) added the life of the Duke of Leinster to the time and term granted by the original indenture: To hold the premises unto the defendant, his heirs and assigns, for and during the life and lives of M. D., D. F. and the Duke of Leinster, and the survivors and survivor, subject to the yearly rent and to the covenants in the indenture of the 10th of May 1792 contained. That defendant by said last-mentioned indenture covenanted to pay the rent on every 29th day of September and 25th day of March; that the last-mentioned term still continued, the life of the Duke of Leinster being still in being; and that on the 25th of March 1849 the sum of £60 for one and a-half year's rent was and still is in arrear.

Breach—Non-payment of the same.

The defendant craved oyer of the deed of 1818, which was as follows:—

"This indenture, made the 21st of April 1818, between Henry Luttrell of, &c., of the one part, and Thomas M'Creery of, &c., of the other part: Whereas by indenture of lease bearing date the "10th day of May 1792, and hereunto annexed, Henry Lawes Earl of "Carhampton, for the considerations therein mentioned, did demise "and set unto William Drought of, &c. (in his actual possession then "being by virtue of a bargain and sale therein recited), all that and

"those the dwelling-house, &c., situate in the city of Dublin, as then
 "held by the said William Drought, to hold to the said William
 "Drought, his heirs and assigns, for the lives of M. D., D. F. and
 "J. M., at the yearly rent of £40, payable half-yearly, in which
 "said lease is contained a covenant for the perpetual renewal thereof
 "on the payment of a fine of one peppercorn: And whereas the
 "estate and interest of the said Earl Carhampton in the said
 "premises is now legally vested in the said Henry Luttrell, and the
 "estate of the said William Drought therein is now legally vested
 "in the said Thomas M'Creery: *And whereas the said John Moore,*
 "*one of the lives in the said lease mentioned, is dead, and the said*
 "*Thomas M'Creery hath applied to the said Henry Luttrell to*
 "*execute a renewal thereof by inserting the life of the Duke of*
 "*Leinster in the place and stead of the said John Moore, to which*
 "*the said Henry Luttrell hath agreed.* Now these presents witness
 "that the said Henry Luttrell, *in pursuance of the covenant for*
 "*renewal* in said lease contained, and for and in consideration of the
 "fine of one peppercorn to the said Henry Luttrell paid on the
 "perfection hereof by the said Thomas M'Creery, the receipt whereof
 "is hereby acknowledged, *hath added and inserted, and by these*
 "*presents doth add and insert to the time and term of said lease, the*
 "life of Augustus Frederick Duke of Leinster, *to have and to hold*
 "*the said premises, with the appurtenances, unto the said Thomas*
 "*M'Creery, his heirs and assigns for and during the natural life*
 "*and lives of the said Mary Drought, David Fleming and Au-*
 "*gustus Frederick Duke of Leinster and the survivor and survivors*
 "of them, and for and during the natural life and lives of all and
 "every such other person and persons as shall from time to time for
 "ever hereafter be added to the time and term of said lease in pur-
 "suance of the said covenant for the perpetual renewal thereof as
 "in said lease mentioned, *subject to the said yearly rent of £40*
 "*sterling, and to all and singular the covenants and agreements in*
 "said indenture of lease contained, and which on the tenant or
 "lessee's part are or ought to be paid, done and performed."

The defendant then pleaded, that after the making of the said
 demise in the declaration mentioned, and of said indenture of the
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21st day of April 1818, and before any part of the rent in the plaintiff's declaration mentioned became due or payable, to wit, on the 5th day of February, in the year of our Lord 1845, in the county of the city aforesaid, he the said defendant, by a certain indenture of assignment by him then made and duly signed by the defendant, and sealed with his seal, for the consideration therein mentioned, did bargain, sell, assign, transfer and set over unto Patrick Roache, his heirs and assigns, all the right, title, property, interest, claim and demand whatsoever of him the defendant, of, in and to the said demised premises, with the appurtenances, to have and to hold to the said Patrick Roache, his heirs and assigns; by virtue of which said indenture of assignment the said Patrick Roache afterwards, to wit, then and there entered into the said demised premises with the appurtenances, and became and was thereof possessed and seized for the said three lives, whereof the plaintiff on the day and year at the place aforesaid had notice; and the defendant further saith that the plaintiff, after the entry of the said Patrick Roache into the said demised premises, with the appurtenances, under and by virtue of the said assignment, to wit, on the 29th day of September, in the year of our Lord 1845, in the county of the city aforesaid, did accept and receive a large sum of money, to wit the sum of £20, late Irish currency, for the rent of the said premises, with the appurtenances, in form aforesaid reserved and made payable, and then and there accepted the said Patrick Roache as his tenant of the said demised premises, with the appurtenances.—*Verification.*

The defendant pleaded, secondly, *non est factum* to the deed of April 1818, and issue was joined thereon.

General demurrer by the plaintiff to the first plea, and joinder by defendant.

Ormsby (with him *Napier*), for the demurrer.

The defendant is estopped from denying we have title, for the deed of 1818 states that the defendant's legal estate is in us, and the defendant had applied to us for a renewal; and so in the declaration it is alleged that in compliance with the request that renewal had been granted. How can it be argued that there is not a covenant

to pay the rent? On the face of the instrument that covenant appears—an instrument under the hand and seal of the defendant. It recites the deed of May 1792, recites the covenant for renewal and the yearly rent, and witnesses that in pursuance of said covenant for renewal, the lessor adds and inserts the new life, “to hold subject to the said yearly rent of £40, and to all and singular the covenants and agreements in said indenture of lease contained, and which on the tenant’s or lessee’s part are or ought to be paid, done and performed.” The maxim, “*Verba relata hoc maxime operantur per referentiam ut in eis in esse videntur*,” applies here: *Llewellyn v. The Earl of Jersey and another* (a). There a deed recited a contract for the sale of certain lands by a description corresponding with that subsequently contained in the deed, and then proceeded to convey them with a reference for that description to three schedules. The portion of the particular schedule relating to the piece of land in question stated in one column the number which this piece was marked on a plan, and in another column, under the heading “description of premises,” it was stated to be a small piece marked on the plan; and the Court of Exchequer held that it was the same thing as if the map or plan referred to in the schedule had been actually inserted in the deed. It is not necessary there should be an express agreement to pay the rent: *Doe d. Rains v. Kneller* (b). The words there were “at and under the rent of £80 a-year;” and Tenterden, C. J., held that they constituted an agreement to pay the rent: *Wolveridge v. Stewart* (c); *Harrold v. Whitaker* (d).

As to the construction of covenants: *Williams v. Burrell* (e); *Curry v. Stanley* (f); *Holles v. Carr* (g). In the case of a renewal is not the party seeking the renewal bound to put himself in the position of a new lessee?

Cuffe (David Lynch with him), contra.

If this deed do not contain an express covenant to pay the rent,

(a) 11 Mees. & Wels. 183.

(c) 3 Tyrw. 637.

(e) 1 Com. B. 402.

(b) 4 Car. & Pay. 3.

(d) 11 Q. B. 147.

(f) Hay. & Jo. 492.

(g) 3 Swanst. 647.

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then there is nothing to bind the defendant: *Nugent d. Atkins v. Sealy and Mullins* (a). The lease in that case was affixed to a lease of the premises, formerly executed by a former tenant for life to the defendant, in which former lease there were covenants, and among them a covenant to pay the rent. In that lease were the words "subject, however, to the payment of £100 sterling yearly "and every year during said term, and likewise subject to the covenants, provisoes and limitations in said lease contained;" and it was held these words did not create a covenant with the lessor in that lease to pay the rent. Here rent is alleged to have been accepted from the assignee: *Tilden v. Walter* (b). After assignment no action of covenant lies against the lessee for rent: *Fisher v. Ameers* (c). There is no express covenant, and the action is founded on express covenant: *Chancellor v. Poole* (d); *Hopkins v. Murray* (e); 2 *Platt on Covenants*, p. 355.

Napier replied, and contended that the case of *Wolveridge v. Stewart* was distinguishable from the present, inasmuch as that was an action between lessee and assignee, and the words "subject to the rent" were held to be words of qualification, not of contract.

Cur. ad. vult.

Nov. 22. The Court, differing in opinion, delivered judgment *seriatim*.

MOORE, J.

His Lordship having stated the pleadings, proceeded to say—

Upon this demurrer two questions have been raised; first, whether the deed of 1818 contained any express covenant for payment of the rent, and secondly, whether such covenant is obligatory on the defendant after his assignment over? These questions depend on the construction of the deed of 1818, and if that deed is

(a) Alc. & Nap. 359.

(b) 1 Sid. 447.

(c) Brownl. & G. 20.

(d) 2 Doug. 764.

(e) 12 Ir. Law Rep. 359.

to be considered to create a new lease for three lives, there will be no difficulty in resolving both questions in the affirmative.

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Before I advert to that deed I would wish to make an observation on the nature of a covenant for perpetual renewal. I consider such a covenant to mean that the tenant is to have at all times a subsisting legal estate for three lives and the life of the survivor, and that the landlord is to have all his legal remedies for recovery of the rent, and this can only be properly effected when a life drops by the creation of a new lease for the existing life and the nominated life; and accordingly when a tenant applies to a Court of Equity for specific performance of a covenant for renewal, the decree is, that the covenant be executed by the landlord executing to the tenant a renewal or new lease for the existing and the nominated lives.

I am now to consider what is the true and legal construction of the deed of 1818. At the time of the renewal the whole of the lessor's interest was vested in Luttrell the plaintiff, and the lessee's interest in M'Creery the defendant, consequently the plaintiff was the person entitled to the benefit of that covenant, and the defendant was the person competent and bound to carry it into execution. They are the parties to the deed of 1818, and until the contrary shall clearly appear, I think it must be considered to have been the intention of the parties to carry out the spirit of the covenant by the execution of a lease for three lives, and thus to preserve to the landlord all his rights. This intention appears to me to be clearly expressed on the face of the deed of 1818, which contains this statement:—"And whereas the said John Moore, one of the lives in "the said lease mentioned, is dead, and the said Thomas M'Creery "hath applied to the said Henry Luttrell to execute a renewal "thereof by inserting the life of the Duke of Leinster in the place "and stead of the said John Moore, to which the said Henry "Luttrell hath agreed." That is an application on the part of the man entitled to the renewal to get a renewal, and a consent to grant it by the party bound to do so. Then the indenture witnesses that Henry Luttrell, in pursuance of the covenant for renewal in said lease contained, hath added and inserted, and by these presents

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doth add and insert, to the time and term of said lease the life of the Duke of Leinster: *to have and to hold* the premises for the three lives named and the life of the survivor, subject to the yearly rent and all the covenants contained therein which on the lessee's part were to be done and performed.

It is contended by the defendant that this deed is not framed in such a way as to carry out in a legal form the intention of the parties, even assuming it to be what I have stated; and the question is, whether the language of the deed is sufficient to carry out that intention? and whether that deed operates as a lease for three lives and the life of the survivor? If this renewal had contained the usual words of grant, no doubt could be entertained but that it would have operated as a perfectly valid deed of lease and release. Are then the words "grant, bargain and sell" indispensable to make it so? I think they are by no means essential and necessary. In *Shepherd's Touchstone*, p. 271, it is said:—"Albeit the most 'usual and proper making of a lease is by the words 'demise, grant 'and to farm-let,' and with an *habendum* for life or years, yet a 'lease may be made by other words; for whatsoever words will 'amount to a grant will amount to a lease. And therefore a lease 'may be made by the words 'give, betake,' or the like." And in *Preston's Note* to this passage he observes:—"It is said to be a 'general rule that the word 'covenant' will make a lease though 'the word 'grant' be omitted, and much more when the words are 'to hold, enjoy,' &c. So that according to his opinion the mere expression and declaration of the intention is as sufficient to make the instrument have the legal effect of a lease as if the most formal words had been introduced.

It is necessary, however, to show that a freehold lease has been created by this deed. The defendant was tenant in possession for two existing lives, and was therefore capable of taking a release; plaintiff had the reversion, and was therefore competent to release it. Here the reversioner adds a new life, and both parties agree under hand and seal that the defendant is to hold and enjoy the lands for that life and the lives of the two subsisting ones, and that agreement and expressed intention can only be carried into effect by

treating this deed as a grant of the reversion; and if it can receive that construction, it would operate as a perfectly valid lease and release. It has been said that this deed cannot pass a reversion for the want of the ordinary word "grant;" but the contrary is distinctly laid down in *Shove v. Pincke* (a). Lord Kenyon says:—"If it were necessary to decide the point, I do not see why this should not operate as a grant of the reversion. It has never been held necessary that the word 'grant' should be used in a grant, it being sufficient that the intention to grant be manifest by a deed." And Buller, J., adds, "the words 'limit and appoint' operate as a grant."

My opinion is that the deed of 1818 operated as a valid lease and release, and that a legal estate was created for a term of three lives and the life of the survivor. If that be so, I think there is no difficulty in deducing or coming to the conclusion that a covenant to pay the rent is contained in the deed. It is well settled that no particular words are necessary to create a covenant. The deed says that the defendant shall hold subject to the yearly rent and to all and singular the covenants and agreements on the lessee's part in said indenture of lease contained. I consider these words to create an express covenant to pay the rent. In *Wolveridge v. Stewart* the Court held that such words were capable of a double meaning and may mean—I give it to you as I have it, subject to all the obligations and qualifications to which it was originally liable; or they may mean an express agreement between the parties for the payment of the rent. Lord Denman in that case says (b):—"It was a very just remark made by the Counsel for the plaintiff in error that it is the duty of a party who intends to bind another by a covenant in a former formal instrument to insert it in that instrument in distinct and intelligible terms by which the party to be bound cannot be deceived, and not to call upon the Court to infer such a covenant from words which are at least equivocal, and which one party may never have meant to use in the sense ascribed to them by the other." And so the Court there decided, in opposition to the opinion of the Court of Common Pleas, that

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(a) 5 T. R. 129.

(b) 3 Tyrw. 652.

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 M'CREERY. such words were words of qualification and not of contract. That case appears to me to be an express authority that the words "subject to" may create a covenant, if such be the intention of the parties. I think the point decided in that case cannot be applied to the present one; for if the intention of the parties in this case was to create a new estate different from that in existence in 1818, and if the words carry out that intention and give it the effect of a lease and release, then the words "subject to" appear to me to be capable of only the one meaning, that of an agreement between the parties that the defendant should pay the rent to the plaintiff, and thus create an express covenant, and then it would be the ordinary case of contract between the lessor and lessee to pay the rent. The demurrer is therefore, in my opinion, well founded.

PERRIN, J.

I concur in the opinion of my Brother MOORE, and in every reason he has assigned. It is merely necessary that I should refer to the instrument as set out on over. It recites a lease to Mr. Drought for three lives with covenant for perpetual renewal; that the lessor's interest in that lease was vested in the plaintiff, and the lessee's interest in the defendant; that one of the lives being dead the defendant had applied to the plaintiff to execute a renewal. Now surely it is no extraordinary violation of language to call that a new lease. It then witnesses "that in pursuance of the "covenant for perpetual renewal the plaintiff doth add and insert "to the time and term of said lease the life of," &c. If he had said "doth give, grant," &c., there could be no question on the matter; but it is said the words "doth add and insert" have no more effect than if he had put a label or tack to the lease. I cannot agree in that opinion. It then adds, to have and to hold the premises for and during the subsisting lives and the life thereby added, and for such other lives as should be added in pursuance of the covenant for renewal, subject to the yearly rent, and all and singular the covenants and agreements in said indenture contained, and on the tenant's or lessee's part to be performed. Now what other meaning can the words "to have and to hold" have than that the defendant

is to hold the premises for those three lives? Suppose all the lives had dropped and an ejectment had been brought, how could it be argued that there was no intention to add to the term by way of enlargement for this life? The authorities are collected in *Preston's Abr. of Titles*, pp. 21 to 25, where it is shown there is no necessity for any particular words to create a covenant, and it is therefore only necessary to see if these be words clearly evincing an intention to enlarge the estate in any way the law allows. But then it is said the words "subject to" do not convey the same meaning as "yielding and paying;" but appears to me the clear intention of one party to enlarge the term and of the other party to bind himself during the continuance of that term.

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CRAMPTON, J.

The question in this case is whether the deed of the 21st of April 1818 contains an *express* covenant on the defendant's part to pay the rent of £40 yearly to the plaintiff during the whole term of three lives named therein?

The plaintiff insists that such a covenant is contained in that deed; the defendant contends that such is not the effect of the deed, but that his liability to pay the rent ceased when, by his assignment over, he ceased to be assignee of the original lease. If the plaintiff's be the true construction, the demurrer should be allowed; if the defendant be right, he is entitled to judgment.

The argument of the plaintiff (as I understand it) is this:—The deed of 1818 contains the grant of a *new estate* for three lives, and there is to be collected from thence and from the terms of the *habendum* an agreement to pay the rent during the term, which, being an agreement under seal, amounts to a covenant. But this argument assumes—first, that the deed of 1818 creates a *new estate*. Again, it assumes that it contains an agreement to pay the rent during the *three lives*. I cannot admit either of these assumptions to be well founded; for, first, I do not think that any new estate is created by the deed of 1818. In that deed I see no words of grant, unless these words, "hath added and inserted, and by these presents doth add and insert to the time and term of said lease the life of," &c.,

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amount to a grant; but if they do, is it not the grant of an additional to a still subsisting term? and if you infer a covenant to pay the rent during the three lives, will not this anomaly arise, that the same party shall be under the two instruments liable to the same person for the same rent—liable by the lease of 1792 to the covenant by privity of estate, and under the deed of 1818 by express covenant.

But I think it is contended on the plaintiff's part that, coupling the words which I have just read with the *habendum* which follows, there is a grant (though an untechnical one) to the defendant for *the three lives named therein*, with an agreement to pay the rent during *that term*. The consequence of this construction must be, that the estate created by the lease of 1792, with all its clauses and covenants, was extinguished by the deed of 1818; for an acceptance of the new estate is a surrender of the old. This construction is *inferred* from the agreements of the parties and their intention as declared by the deed. And I now come to inquire whether the agreement and intention of the parties, as declared by themselves, can warrant this inference? The deed of 1818 purports to be a renewal of the lease of 1792 in pursuance of the covenant for renewal contained in that lease. That covenant is in the following words—[His Lordship read the covenant].—By this covenant the renewal is to take place either by indorsement on the lease—by a label attached, or by a separate deed or writing stating the life deceased and the life to be inserted; and it may not be immaterial to observe that the contemplated renewal might, according to the covenant, have been effected by a *mere writing* without any deed, and therefore without creating any new estate or any new covenant. No doubt, the renewal of 1818 might have been by a separate detached instrument, and might or might not have created a new estate altogether; but in point of fact the renewal of 1818 is made, not by a separate detached parchment, but by an instrument to which the lease of 1792 is *annexed*, so as to form one instrument with it, thus manifesting the intention of the parties that the lease of 1792 was to stand good along with the deed of 1818. The intention is stated to be to execute a renewal by adding and

inserting a new life in the stead of the departed life to the existing term, and this is the thing agreed to be done ; so that the agreement is not to grant a new estate, but to continue the old by adding and inserting a new life—that is, by fulfilling the condition upon which the original estate was to be enlarged. This is the agreement and intention of the parties, and this is what the parties proceed to do, and accordingly the new life is added “to the time and term of said lease,” implying necessarily the continuance of that time and term enlarged by the addition of the new life, and the *habendum* expresses the legal result of the renewal deed and of the lease of 1792 annexed thereto, viz., that the tenant was to hold during the new as well as the old lives, &c., but subject to the covenants in the original lease ; these covenants the tenant could be subject to only by the continuance of the original lease ; they cannot be incorporated into the deed of 1818.

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It may be possible, as argued by the plaintiff, that a deed may be so referred to as to be made part and parcel of the reciting instrument, and thereby its covenants introduced into the new instrument ; but it appears to me impossible to conceive that the deed of 1792 can be held to be annulled and at the same time its covenants transferred to the deed of 1818. Again, that deed of 1818 contains no covenants on the landlord's part. If the deed of 1818 create an entirely new estate annihilating the old, this is unintelligible ; but suppose the old estate to continue, and the deed of 1818 to operate as an enlargement only, and all is clear and consistent.

It may be unnecessary for me to stop here and inquire whether the intention of the parties to continue the tenant's estate by way of enlargement has been legally carried out, or whether the conditions upon which the enlargement was to arise have been strictly fulfilled. I may observe, however, that two of the lives named in the original lease were still subsisting in 1818, and that the new life was, according to the pleadings, nominated within the time prescribed by the covenant for renewal. The doctrine of enlargement upon conditions fulfilled was a well-known doctrine. Upon it there is some reason to believe that the practice of leasing for lives renewable for ever (so common in Ireland) was founded. The doctrine is referred to

M. T. 1850. in the case of *Jack v. Reilly* (a) by the late venerable Judge Burton,
Queen's Bench a great authority in this and in every Court. The subject is elab-
 LUTTRELL orately discussed in a note to that case (*Jack v. Reilly*) by the
 v. learned Reporter. But whatever be the true legal effect of the deed
 M'CREEEY. of 1818, it is sufficient for my argument that it was the intention of
 the parties by that deed to effectuate the renewal by way of enlarge-
 ment, and not by the creation of a new estate and the annihilation
 of the old.

Some stress has been laid on the word "renewal," as if it was tantamount to the words "new lease;" but the terms are clearly not identical; every new lease made under a covenant for renewal is properly a renewal; but every renewal is not a new lease. The practice of renewing by labels, at one time familiar in this country, is inconsistent with this notion, and the very terms of the covenant for renewal in the lease of 1792 are a contradiction to it. The case of *Stewart v. Wolveridge* has been relied upon by the plaintiff's Counsel, and the language of Chief Justice Tyndal quoted, to show that the Court in such a case as the present should infer an agreement, and therefore an express covenant to pay the rent. But the difference between the two cases is obvious. First, in *Stewart v. Wolveridge* it was not only that it was the intention and agreement of the parties to create a new estate, but a new estate was actually created. By the lessee's assignment to the assignee, and his acceptance by deed of that assignment, the legal estate in the leasehold interest actually passed away from the lessee and became vested in the grantee. The grantee there then took the estate, subject to all its duties and liabilities, and the Court of Common Pleas held that such acceptance, with the *habendum* to hold, subject to the term, &c., raised the inference of an intention in the parties to agree that the assignee should pay the rent to the lessee during the whole term; and that agreement being under seal, it amounted to a covenant, and accordingly the Chief Justice and the other Judges rested the case on the acceptance of the estate by the defendant, and the intention and agreement of the parties appearing on the face of the deed. This case was reviewed in the Court of Exchequer Chamber, and

(a) 2 H. & B. 306.

the judgment was reversed, that Court considering that the words relied on by the Court of Common Pleas, as showing an agreement to pay the rent during the whole term, viz., "subject to the rent," &c., showed rather an intention to contract for the payment of the rent during the continuance of the defendant's tenancy, a more natural construction, considering the relation of the parties, than that of the Common Pleas. And such is the construction which I would put upon the similar words in the instrument now before us.

But the Common Pleas and the Exchequer Chamber both drew their different constructions in the case of *Stewart v. Wolveridge* from the grant made and accepted, and from the supposed intention and agreement of the parties to be inferred and collected from the terms of the instrument.

In this case the intention and agreement of the parties is not to be collected by mere inference; it is expressed and declared by the parties in the deed itself, and that intention and agreement appear to me to be inconsistent with the notion that the lease of 1792 was to be surrendered and a new relation established between the parties. The construction I put on the transaction is injurious to no party. It leaves the original lessee and his heirs subject upon their express covenant, and binds the assignee so long as he continues in privity of estate.

It was urged that we should hold that the reference made by the deed of 1818 to that of 1792 incorporated all the covenants of the latter deed into the former; but to this doctrine I cannot accede. It would be to make covenants entered into by different parties in a former instrument binding upon new parties—a species of conveying which is quite without precedent, and which would in my judgment be attended with great confusion and perplexity; and indeed there is express authority against such a notion in the case of *Burnett v. Lynch (a)*. And here I may ask, if the true construction of the deed of 1818 be, as contended for, that it created a new estate in the tenant and operated as a surrender of the lease, why is not the declaration in conformity with that view? In that view of the deed the declaration should have simply averred the creation of the estate for three lives by the deed of 1818, the covenant to pay

(a) 5 B. & C. 589.

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the rent and its breach; I may add, in the words of Buller, J., in *Chancellor v. Poole* (a)—a case in some respects not unlike the present—"It strikes me that if the plaintiff had considered the deed
"poll as a new lease, and the defendant as his immediate lessee, he had
"no occasion to state the first in his declaration. He seems to have
"concluded himself;" but the pleader in this case states the original lease as a subsisting instrument, and assumes that the defendant being to hold subject to the rent and covenants in the original lease, was thereby made liable not to those covenants (for he was no party to them save as privy in estate), but to similar covenants to be incorporated in a new instrument. The whole comes to this:—Is there a new estate created, and an agreement on the part of the defendant to pay the rent? I think no new estate was either intended to be or was created, nor was there any agreement to change the relation between the parties; but the intention of the parties was to continue the old estate by the way of enlargement, and to leave the relation of landlord and tenant as it stood before; I therefore have come to the conclusion that this demurrer should be overruled.

BLACKBURN, C. J.

This action is brought by the plaintiff against the defendant, both being parties to the deed containing what the plaintiff relies on as a covenant. The question is, whether the defendant bound himself by this deed to pay the plaintiff the annual rent of £40 as long as the surviving *cestui que vies* and the Duke of Leinster or any of them should live? That this was intended by the parties I cannot have any doubt. It is plain on the one hand that the defendant was to acquire an estate for the life nominated, in addition to the lives of the two existing *cestui que vies*; and on the other hand, that he was to hold for the lives of those three persons, and of the survivors and survivor of them, and that as long as they or any of them lived, he was to hold subject to pay the rent of £40, the amount contained in the original lease.

However shortly or generally expressed, there is, in my opinion,

(a) 2 Doug. 767.

no real doubt of the actual intention of the parties. It has not been, and indeed could not have been, contended, that the authorities cited and relied on of *Wolveridge v. Stewart and Nugent v. Atkins*, have laid down as a rule of law, that the words "subject to" that are here used cannot constitute a covenant to pay the rent; according to those cases they plainly may do so, if used to express that intention: that they were so used here is plain, as well from what I have already said of their object, as also because no person could have obtained or inferred it on any other terms than those of complete reciprocity; whoever claimed, as assignee of the tenant, to have his estate renewed, was bound to put himself in the tenant's place, and to become liable to the tenant's obligations. The very nature of the right therefore which the covenant effectuated, made it just and right that the words we are considering should bind the defendant to pay the rent.

A difficulty however of another kind is relied on as opposed to this construction:—it is that no estate passed, and that therefore as the defendant got no estate in the land by the deed, there could be no liability on his part to pay rent for it. If I were to consider the addition of the life as resting merely in covenant, I should still, as between the parties to the deed, find it difficult, if not impossible, to say that the landlord was bound to let the tenant hold the land, and that the tenant did not by such words as are here used bind himself to pay for it the rent of £40. But, not to rest on this view of the deed, is the proposition plain that the deed did not create an estate for the life of the Duke of Leinster? The defendant, when this deed was executed, was seised for the lives of the surviving *cestui que vies*, and capable of accepting a release from the plaintiff; and in my opinion when the reversioner agreed and intended to execute a renewal, that is, to give the lands to be held for the lives named, the deed may well be considered as operating to release the lands to him for three lives. It is true that the technical term "release" is not used; but I do not think that it is essentially necessary that it should. In *Shepherd's Touchstone*, p. 327, it is said:—"All releases (of what kind soever) are commonly made by these words *remisisse, relaxasse et quietum clamasse* as being the most ancient and significant words

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M. T. 1850. "to this purpose; and amongst these words *release* is the most
Queen's Bench "effectual word as that which doth include the other two, and as
 LUTTRELL "that which is the proper and peculiar word for this kind of con-
 v. "veyances. But there are other words also by which a release
 M'CREEERY. "may be made, as *renunciare, acquietare, &c.* And therefore it is
 "held if one have common on another's land, and he by deed
 "release it to him thus, *renuntio communiam meam*, this is a
 "good release. And if the lessor do but grant to his lessee for
 "life that he shall be discharged of the rent, this is a good release
 "of the rent." If therefore the word "release" is not indispensable,
 I see no reason why this deed should not operate as a release; and
 giving it this operation, effectuate the intention of both the parties.
 It gives an estate in the lands to the defendant of the exact nature
 and duration to which he was entitled, and securing the rent which
 it was just and right the defendant should pay and render for them.

Demurrer allowed.*

* In a previous Term a special demurrer had been taken to the plea in this case on the ground that it purported to set out the deed of 1818 *verbatim* without having craved oyer; that demurrer was allowed, and leave to amend by setting out the deed on oyer was granted by the Court.

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Nov 5.

A declaration on a guarantee stated that one *Jane C. Duffy* was indebted, &c., without alleging any reason for not setting out the name in full, or any averment that it was unknown to the plaintiff.

Held, on special demurrer, sufficient.

ASSUMPSIT on a guarantee.—The first count of the declaration stated that one "Jane C. Duffy" was indebted to the plaintiffs in £200, and that a certain action had been commenced and was then depending against her at the suit of the plaintiffs to recover said sum; and that in consideration thereof, and of the plaintiffs undertaking to sign a certain composition deed for the said "Jane C. Duffy," under the description of Mrs. Duffy, the defendant undertook to pay the law expenses which the plaintiffs had been at in proceeding against the said "Jane C. Duffy;" and that the composition should be paid within a month.

Special demurrer to this declaration, assigning as cause that it was defective in not setting out the Christian-name of the person therein designated Jane C. Duffy, or that the same was unknown to plaintiff and that the name of Jane C. Duffy was an impossible name.

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J. Perrin and *D. Lynch*, in support of the demurrer, relied on the following authorities :—*Levy v. Webb* (a) ; *Esdaile v. McClean* (b) ; *Applemans v. Blanche* (c) ; *Gatty v. Field* (d) ; *Kinnersley v. Knott* (e) ; *Clifton v. Mongan* (f). In all these cases it was held that the full Christian-names of persons mentioned in pleadings should be stated therein, or a sufficient excuse shown for the omission, and that the proper mode of objection is by demurrer. In *Kinnersley v. Knott* the cases decided on this subject are collected. A description of a person by a consonant is no description by name ; but it is otherwise if a vowel be used. The provisions of the statute 3 & 4 *Vic.* c. 105, s. 41, are not applicable to the present case, being confined to the parties to the action : *Applemans v. Blanche*.*—[PERRIN, J. May not the name be *Cee* ? and if that be so, it is only incorrect spelling, and that would not be ground of demurrer ; or may it not be taken as part of the Christian or surname ? Do not the letters I. O. U. make a contract ?]

(a) 9 Q. B. 427.

(b) 15 M. & W. 277.

(c) 14 M. & W. 154.

(d) 9 Q. B. 431.

(e) 18 Law Jour. N. S. 281 ; S. C. 7 C. B. 980.

(f) 12 Ir. Law Rep. 61, Exch.

* Notwithstanding the *dictum* of Parke, B., in *Applemans v. Blanche*, that the enactment of the corresponding Act in England is confined to parties to the action, it would appear to apply as well to third parties. The statute provides that in all actions upon bills of exchange or promissory notes, or other written instrument, any of the parties to which are designated by initial letters, &c. ; the word *which* there must be held to apply not to the parties to the suit, but to the parties to the written instrument ; and such appears the construction put upon it by Maule, J., in *Kinnersley v. Knott* (7 C. B. 986) ; and all the cases in which the demurrer has been allowed go expressly upon the ground that in describing the party the case was not brought within the provisions of the Act of Parliament, by showing that he was so named in the written instrument.

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Osborne, for the plaintiff.

The Court will be astute to support this declaration, and not to allow a point so wholly beside the merits to prevail. For the purposes of this argument the Court will consider *Jane C.* as one name. Lord Ellenborough, in *Scott v. Soans* (a), considered "Jonathan, otherwise John," as one name, and this decision was approved of in *Walker v. Parkins* (b); *Lindsay v. Wells* (c). In the case of *Lomax v. Landells* (d), the latest English decision on the subject, it was held that the letter J must be taken on demurrer to be the actual name of the party; and that case is in accordance with the decision of this Court in the case of *Gawley v. M'Donel* in this Court (e). That was an action on a bill of exchange, and the plaintiff was in that case described as Thomas H. Gawley; the case was fully argued by Mr. *Chatterton* in support of the demurrer, and Mr. *Hayes* in support of the declaration, and the Court were of opinion the objection was untenable, and overruled the demurrer. The LORD CHIEF JUSTICE there observed, that if the plaintiff were, as contended for by the plaintiff's Counsel, misdescribed, the demurrer was well founded, but that the Court would not presume that to be so; that whether the initial used in that case be taken as part of the surname or Christian-name of the party named, or as forming a portion of his baptismal name, the Court must presume it to be part of his name.

Lynch replied.

BLACKBURN, C. J.

We abide by our former decision, and will overrule this demurrer.

Demurrer overruled.

(a) 3 East, 111.

(b) 2 Dowl. & L. 982.

(c) 3 Bing. N. C. 777.

(d) 6 D. & Low. 396; S. C. 18 Law Jour. (N. S.) C. P. 88.

(e) M.SS., T. T. 1848.

M. T. 1850.
Queen's Bench

Lessee TAYLOR v. THE EJECTOR.

Nov. 2.

HAMILTON SMYTHE, on behalf of H. Thompson, a third party interested in the premises the subject-matter of the ejectment in this cause, moved that the proceedings on the *habere* be stayed on payment of the rent for which the ejectment had been brought, and the costs of the ejectment.

The ejectment had been brought for one and a-half year's rent ending 1st of November 1849, and a judgment was had by default. The 11 *Anne*, c. 2, s. 5, enacts, that if the tenant at any time before the trial of the ejectment pay or tender to the landlord all the rent and arrears, together with the costs, then all proceedings on the ejectment are to be discontinued. That clearly applies to the rent due at the time the ejectment was brought. Then the 4 *G.* 1, c. 5, s. 3, provides, that when it shall appear to the Court where the suit is depending, by the affidavit of the landlord or his agent, or on the trial, in case the defendant appears, that more than one year's rent is due before the summons was served, then the landlord shall recover judgment, and the Jury who shall try the cause, in case it shall be before a Jury, and if not, the Judge before whom the judgment shall be given, shall ascertain the sum that shall be so due and in arrear; and in case the lessee shall suffer judgment to be recovered on such ejectment, and execution to be executed thereon, without paying on demand the rent so ascertained to be in arrear, he is to be foreclosed. The same meaning ought to be given to the language of both statutes when speaking of the arrears, and it must be held to apply only to arrears due at the time of bringing the ejectment, otherwise the Court would give a contradictory construction to those statutes.

Where judgment has been had in an ejectment for non-payment of rent by default and an *habere* issued, the defendant is not entitled to have the proceedings stayed on payment of the rent for which the ejectment was brought, and the costs.

PERRIN, J.

The 11 *Anne* only applies to cases before trial, and does not apply to cases of judgment by default.

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I admit no case has been decided where the Court stayed the proceedings on payment of the rent where there had been a judgment by default; but the same principle ought to apply to both cases.

CRAMPTON, J.

The tenant could only redeem in a Court of Equity by paying all rent due up to the time of redemption.

Ormsby, contra.

The motion is quite untenable. The lessor of the plaintiff is entitled to issue his *habere* for all rent due up to the 1st of this month; he is, however, willing to accept all rent due up to the 1st of May 1850.

The Court being of opinion that the offer ought to be accepted, there being no ground for the motion, the following order was made :—

Per Curiam.

Let the execution of the *habere* in this cause be stayed for one fortnight, the said H. Walker Thompson undertaking within that period to pay the rent ascertained, together with the rent due up to and for the 1st of May last, and the costs of the ejectment and the costs of this motion.

NOTE.—It would appear the course of proceeding in a case like the present is regulated by the 9 & 10 Vic. c. 111, s. 3, which provides, that if the tenant or tenants, or his or their assignee, or any person served with an ejectment, shall at any time before the writ for execution in any ejectment for non-payment of rent in any Superior Court shall be executed, pay or tender to the lessor or landlord, or his agent, all the rent and arrears *then* due, together with the costs, all further proceedings shall cease and be discontinued. The rent there referred to must be all the rent due at the time of the tender, and not that alone for which the ejectment was brought.

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v.

THE IRISH SOUTH EASTERN RAILWAY COMPANY.

June 3, 4.
 Nov. 2.

THIS case came before the Court on a demurrer to a return to a writ of mandamus which had issued, directed to the Irish South Eastern Railway Company.

The writ of mandamus recited the several Acts of Parliament incorporating the Irish South Eastern Railway Company, and that by that name and style and for the purpose of the undertaking it should be a body corporate, and should have power to hold lands within the restrictions contained in the Acts relating to the Great Leinster and Munster Railway Company and to the Wexford, Carlow and Dublin Junction Railway Company respectively, and all the rights, powers, privileges and authorities by these Acts created or given, and all the lands, tenements, hereditaments, chattels, moneys, contracts and other properties, and the capital stock and shares of the two Companies, and the powers given to and then vested in them should be and were thereby vested in the Irish South Eastern Railway Company.

That it was enacted that the tolls in respect of the Irish South Eastern Railway Company should be calculated and imposed at such rates as if the Great Leinster and Munster Railway and the Wexford, Carlow and Dublin Junction Railway had originally formed one line of Railway, provided that the rates of tolls to be imposed by the Irish South Eastern Railway Company on all and every part of the amalgamated Railways should not exceed the rates authorised to be levied and taken by the Act of the Great Leinster and Munster Railway Company.

The writ further recited that the two bills recited in the Great Leinster and Munster Railway Act passed into law in the Session of Parliament holden in the ninth and tenth years of the

A Railway Company is not bound to carry a mail guard with bags at the same rate as an ordinary passenger; and before the Postmaster-General can compel a Railway Company to carry such mail bags, a privity must exist between them by the execution of a special contract.

M. T. 1850. Queen, and became respectively Acts of Parliament, one thereof
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THE QUEEN having passed in the Session of 9 & 10 *Vic.*, and that it was thereby
v. enacted that all the provisions, matters and things contained in
IRISH S. E. the recited Acts in the last mentioned Act relating to the Great
RAILWAY Leinster and Munster Railway Company, so far as the same were
COMPANY. then in force, and were not inconsistent with, or altered by, the
provisions of the said Act intituled "An Act to enable the Great
"Leinster and Munster Railway Company to extend their Railway
"to Clonmel," and save in so far as the same might not be incon-
sistent with the Lands Clauses Consolidation Act (1845), or with
the Railway Clauses Consolidation Act (1845), should extend to the
said Act and to the several purposes thereof as fully and effectually
as if the same provisions, matters and things were repeated and re-
enacted therein; that it was thereby further enacted "That the
"extended Railway and works should be consolidated with and
"form part of the undertaking of the Great Leinster and Munster
"Railway Company, and of any other Railway Company with
"which the Great Leinster and Munster Railway should be amal-
"gamated. That the Company should not demand or receive
"any greater sum in respect of the carriage of passengers conveyed
"on the Railway by the said Extension Act than three pence per
"passenger per mile in respect of any passenger travelling in a first
"class carriage; two pence per passenger per mile in respect of any
"passenger travelling in a second class carriage, and one penny per
"passenger per mile in respect of any passenger travelling in a
"third class carriage, including the charges for the use of carriages
"and locomotive power, and all other charges incidental to such
"conveyance, unless in the case of passengers travelling by special
"trains."

The writ further recited that the other of the bills recited in the
Act also became an Act of Parliament in the Session of 9 & 10 *Vic.*,
and thereby created several persons into a Company for making a
Railway from Carlow to Enniscorthy, and to join the line of a pro-
posed Railway from Waterford, Wexford and Wicklow to Dublin;
that it was thereby further enacted that the Railway should com-
mence by a junction with the Great Southern and Western Railway

Company near the town of Carlow, and terminate at a place called Scarrawaleh Bridge, in the county of Wexford. That it was thereby further enacted that the maximum rate of charge to be made by the said Company for the conveyance of passengers, including the tolls for the use of the Railway, &c., should not exceed three pence per mile for every first class passenger, two pence per mile for every second class passenger, and one penny per mile for every third class passenger, and that every passenger travelling on the said Railway might take with him his ordinary luggage not exceeding one hundred pounds in weight for first class passengers, sixty pounds in weight for second class passengers, and forty pounds in weight for third class passengers, without any charge being made for the carriage thereof.

The writ further stated, that in pursuance of said Acts of Parliament the Irish South Eastern Railway Company was established, and that they had caused to run at stated and fixed hours upon each and every day trains of Railway carriages upon the part of the Wexford and Carlow Railway between the Junction with the Great Southern and Western Railway Company and Bagnalstown, other than mail trains for the conveyance of passengers at certain fixed rates and prices, together with their luggage, according to the weight prescribed by the Act for making a Railway from Wexford to Carlow.

The writ stated that *by a certain other Act of Parliament, passed in the Session of Parliament holden in the seventh and eighth years of the Queen, intituled "An Act to Attach certain Conditions to the Construction of Future Railways authorised or to be authorised by any Act of the then present or succeeding Sessions of Parliament;" and for other purposes in relation to Railways, after reciting that by an Act passed in the 2 Vic., intituled "An Act to Provide for the Conveyance of the Mails by Railways," provision was made for the transmission of the mails by Railways, and it was expedient that such provision should be extended, it was, amongst other things, enacted that it should be lawful for the Postmaster-General to require in the manner and subject to the conditions as to payment for service performed prescribed by the*

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said last recited Act, that the mails be forwarded upon any such Railway as therein before last mentioned at any rate of speed which the Inspector-General of Railways for the time being should certify to be safe, not exceeding twenty-seven miles in the hour, including stoppages; and it should also be lawful for the Postmaster-General to send any mail guard with bags not exceeding the weight of luggage allowed to any other passenger, or subject to the general rules of the Company for any excess of that weight by any train other than a mail train upon the same conditions as any other passenger.

The writ further stated, that on the 20th of January 1849, at the Railway station at Bagnalstown, on that part of the line of Railway between the Junction with the Great Southern and Western Railway Company at or near Carlow and Bagnalstown, constructed by and belonging to the Irish South Eastern Railway Company, James Carroll, a mail guard, sent by her Majesty's Postmaster-General, applied to be conveyed as an ordinary second class passenger with bags not exceeding sixty pounds in weight, being the weight of luggage allowed by the Company to all other second class passengers on that part of the Railway belonging to them, situate between Bagnalstown and Carlow, pursuant to the said Act of Parliament, by one of the trains other than a mail train so established by the Company for the conveyance of passengers, then about to proceed with passengers along the said last mentioned part of the line of Railway, and then and there tendered to the Company the sum of one shilling and six pence, the sum fixed by the Company as the fare of a second class passenger on that portion of the line, and applied for a ticket from Bagnalstown to Carlow as such second class passenger; that the Company refused to allow Carroll to proceed by the train and refused the said sum of one shilling and six pence from him, and would not give him the said ticket.

The writ further stated that the Earl of Granville and Sir Edward Ryan, two of her Majesty's Commissioners of Railways, by notice in writing, under their hands and duly sealed with the seal of the said Commissioners, after the refusal of the Company to convey James Carroll, being such mail guard as aforesaid, and dated the

27th of November 1849, gave notice that in pursuance of the Act of Parliament made and passed in the seventh and eighth years of the Queen, and of a certain Act of Parliament made and passed in the ninth and tenth years of the Queen, intituled "An Act for constituting Commissioners of Railways," the Commissioners would, after the expiration of twenty-one days from the time of the Company being served with the said notice, certify to the Attorney-General for Ireland that it appeared to them that the provisions contained in the Act of 7 & 8 Vic. had not been complied with by the Company by the refusal to allow, at the request of the Postmaster-General, James Carroll, being then a mail guard, sent by the Postmaster-General to be conveyed with certain bags not exceeding sixty pounds in weight of luggage, being the weight of luggage allowed by them to all other passengers by a train belonging to the Company not being a mail train, and that it would be for the public benefit that the due performance of the said provisions should be enforced. That the notice was served on the Company on the 3rd of December 1849; that the Commissioners had, after the expiration of the twenty-one days, certified accordingly to the Attorney-General, and that the Company still refused, notwithstanding repeated applications for the purpose, to permit a mail guard to travel as before stated, and that the Attorney-General requested the Court to enforce the performance of the provisions of the last mentioned Act of Parliament.

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The writ concluded by commanding the Irish South Eastern Railway Company, "immediately after the receipt of this writ, to convey upon the Irish South Eastern Railway, at the request of her Majesty's Postmaster-General, James Carroll, being such mail guard, or any other mail guard with bags not exceeding sixty pounds in weight, being the weight of luggage allowed by the Irish South Eastern Railway Company to any other passenger by any train belonging to the Irish South Eastern Railway Company, other than a mail train, on the same conditions as any other passenger according to the provisions of the Act of Parliament 7 & 8 Vic., or show cause to the contrary," &c.

The return of the Company certified that the Postmaster-General,
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before James Carroll applied to them to be conveyed, had not by notice in writing or otherwise required that the mails or post letter bags should be conveyed and forwarded by their Railway either by the ordinary trains of carriages or by special trains, according to the statute in that case provided, and that no remuneration had been fixed and agreed on between the Postmaster-General and the Company, or determined by arbitration as in said statute provided, to wit as provided by the Act 1 & 2 Vic., intituled "An Act to Provide for the Conveyance of Mails by Railway," and that before or at the time James Carroll applied to the Company to be conveyed no mail train whatever was running on, or had ever been by the Postmaster-General required to be run upon the Railway, and that for these reasons the Company were not by law bound to convey James Carroll with bags as by him required. They further certified that the Postmaster-General had not at any time by any notice in writing or otherwise required that the post letter bags should be conveyed and carried by Railway, either by ordinary trains of carriages or by special trains, according to the provisions of the said Act; and that no mail train whatever had been running, nor had any mail train at any time been required to be run by the Postmaster-General upon the Railway, and that for these reasons the Company were not by law bound to convey James Carroll on their Railway.

Demurrer by the *Attorney-General* to this return, and joinder by the Company.

The demurrer being, on motion of *John Perrin*, set down in the Crown list for argument, was now heard.

Perrin and the *Attorney-General*, for the demurrer.

The Act relating to the Great Leinster and Munster Railway is 9 & 10 Vic. c. 168 (local and personal); but the statute on which this argument depends is the 7 & 8 Vic. c. 80, s. 11, enacting "That it shall be lawful for the Postmaster-General to require, in the manner and subject to the conditions as to payment for service performed prescribed by the said Act, 1 & 2 Vic. c. 98, that the mails be forwarded upon any such Railway as is hereinbefore last mentioned,

“at any rate of speed which the Inspector-General of Railways for the time being shall certify to be safe, not exceeding twenty-seven miles in the hour, including stoppages; and it shall be also lawful for the Postmaster-General to send any mail guard with bags not exceeding the weight of luggage allowed to any other passenger (or subject to the general rules of that Company for any excess of that weight) by any trains other than a mail train, upon the same conditions as any other passenger, provided that in such last-mentioned case nothing herein or in the last recited Act contained shall be construed to authorise the Postmaster-General to require the conversion of a regular mail train into an ordinary train, or to exercise any control over the Company in respect of any ordinary train, nor shall the Company be responsible for the safe custody or delivery of any mail bags so sent.” With this statute must be considered the one therein referred to and incorporated with it, the 1 & 2 Vic. c. 98, which provides for the conveyance of the mails by Railways. The effect of the return is, that inasmuch as the Postmaster-General had not under 1 & 2 Vic. c. 98 entered into a contract with this Company, the Company were not bound to carry a mail guard with bags.—[PERRIN, J. The return does not say there was no contract.]—However, the words of that 11th section are perfectly general; there is nothing to restrict them:—“Any mail guard with bags not exceeding the weight, &c., by any trains other than a mail train.” We contend that a mail guard is entitled to ask for a second class ticket to travel along the line with bags not exceeding a certain weight.

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Fitzgibbon, Martley and Sir C. O'Loughlen, contra.

If the argument of the other side be correct, this Company must work their line at an enormous loss. The mail trains are obliged to run at a certain speed and cost for each train four pence per mile; and the Postmaster-General says, “Because I have contracted with the Southern and Western Company to carry the mail, I can force you the South Eastern, having a branch line into the other, to run a mail train too;” and this, having entered into no contract with the latter Company, but simply because the South Eastern have

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started a train to meet the mail train on the Southern and Western. —[PERRIN, J. Are you bound to take any passenger that offers? You are only bound to do with the Post-office people what you do with others.]—But a mail guard should not have a privilege denied to other persons, that of carrying his bags in the carriage when the luggage of another passenger would be objected to. The guard cannot be separated from the bags; and what the Company say is that the Post-office authorities must bring themselves into privity with them before they can force them to take the mail guard. “Any such Railway” in that 11th section means the Railway previously specified; that is, Railways with whom the authorities have contracted. Its provisions can only apply when there is a privity created by the prior establishment of a mail train; Railway Companies are strictly not common carriers; they are only bound to carry personal luggage; not necessarily bound to carry goods or parcels.

The *Attorney-General* (Monahan) replied.

Railway Companies cannot be established without obtaining large powers from Parliament. It is not necessary to contend that they are common carriers; for if the Postmaster require a special train he must pay for its cost, minus the profit derivable from the public. The 7 & 8 Vic. c. 85 is applicable to all Companies, and that 11th section applies to a Company having a mail train as well as a Company having none. If they have a mail train, and in addition have an ordinary train at another hour, if it suit the Postmaster he is entitled to send guard and bags by that other train. Nothing in the section cuts down the general words.—[MOORE, J. Except reading them with the previous special words.]—But there is nothing to negative their liability to carry passengers if the passengers comply with the regulations of the Company. The Company refuse in order to force the Postmaster into a contract with them.—[CRAMPTON, J. What is the meaning of the proviso, “That nothing therein or in the last recited Act contained shall be construed to “authorise the Postmaster-General to require the conversion of a “regular mail train into an ordinary train, or to exercise any con-

"trol over the Company in respect of any ordinary train?"—That is, because a mail train can only be got rid of by notice to the Company. "Any train other than a mail train" means a train not under the provisions of the previous Act of Parliament (1 & 2 Vic.) The proviso need not be co-extensive with the enacting part; and all that is meant by it is, that where there is a mail train it cannot be converted into an ordinary train.—[BLACKBURN, C. J. The words are, "upon any such Railway as is hereinbefore last mentioned."—That means a case in which a guard is sent with mail bags in a train other than a mail train, which is provided for by the 1 & 2 Vic. Why should the Company have the power of refusing to carry a small mail bag a short distance, unless the Postmaster enter into a special contract with them? Why should the Postmaster have a privilege with one Company and not with another? The Company are paid for one duty, and yet they want to force the Postmaster to pay for another.

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Sir C. O'Loughlen was again heard for the Company.

Cur. ad. vult.

BLACKBURN, C. J.

The question in this case depends on the construction of the 11th section of the 7 & 8 Vic. c. 85; but it is necessary to advert to the Act of the 1 & 2 Vic. c. 98, which makes provision of an elaborate and compulsory character whereby all Railway Companies are bound to provide for the safe and speedy transmission of the mail, whereby every Company without exception is secured reasonable remuneration for the services which it binds them when required to render. These may be said to be the principles on which all these enactments are based.

The 11th section of the above statute, after referring to the 1 & 2 Vic. c. 98, reciting, that it is expedient that the provisions made by it for the transmission of the mails should be extended, its enactments do accordingly extend them; and the first extension is by enabling the Postmaster-General to require in the manner, and

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subject to the conditions or to payment for services performed, prescribed by the former Act, that the mails shall be forwarded at any rate or speed, certified to be safe, not exceeding twenty-seven miles an hour. The power thus given to the Postmaster-General is a mere addition to those provided by the former Act, and can only relate to cases in which its provisions were in actual operation by the establishment of mail trains pursuant to contract. This is admitted; but it is contended by the *Attorney-General* that the clause which follows, which is the second extension, refers to all Railway Companies, as well those in which there has been no contract with the Postmaster-General as those in which there has. On the other hand it is contended that this provision, like the first, is confined to the case of Companies under contract to carry the mail, and bound to have trains for that purpose. The consequence of the former construction is to create a liability extending to every Railway Company, and to give the Postmaster-General a right to have the mails (not exceeding a certain weight) carried for passengers without any special remuneration.

It is in my opinion quite impossible to reconcile such an unlimited power with the various provisions of the former Act, so studiously framed to secure the safe and rapid transmission of the mails, and adequate remuneration to the Railway Companies. Considering the vast extent and possible effect of a power which has no other limit than the weight of the mail to be carried, and considering its plain violation of one of the principles of the previous Act, one would have expected a clear and unambiguous expression of such an object and intention, and that the enactment to effect it would not have been coupled with one relating exclusively to those Companies who were or should be bound to carry the mail.

To make *such* Companies liable to the provisions in question, would be neither unfair or unreasonable, because it would only oblige them to convey by a common train a portion of the mail, the whole of which they were already bound to carry by a mail train. If we thus limit the construction of the last clause, its operation will be to bind them to carry for their employers letter bags which may arrive at the station too early or too late to be despatched by a mail

train. But however reasonable this limitation may be, it cannot be adopted if it is not warranted by a fair interpretation of the clause in question. The words of it are, "And it shall also be lawful for the Postmaster-General to send any mail guard with bags not exceeding the weight of luggage allowed to any other passenger (or subject to the general rule of the Company for any excess of that) by any trains other than a mail train, upon the same conditions as any other passenger." The words, "and it shall also be lawful," with which this enactment begins would naturally import that the object was to extend the provisions of the first clause of the section by subjecting the same Companies who were thereby made liable to accelerate the transmission of the mail to the exercise of an additional power by the Postmaster-General. The words which follow seem to indicate the same intention; the phrase "other than" is an exception. That they apply to and make provision for cases in which Railway Companies are bound to carry the mail and to have mail trains, is admitted; to apply them to cases in which there is no mail train, that is, to exempt from liability Companies that could have no *such* train, would be absurd; and to avoid this we are called on to say that the words "any train" apply to all trains of all Companies. I do not think that this is the necessary meaning of these words, nor that it was meant to use them in a sense that would make the enactment a departure from the principles on which both these statutes in *pari materia* and for the same common objects are founded. The words of the proviso seem strongly opposed to the unlimited construction contended for by the *Attorney-General*. They are, "Provided that in such last mentioned case nothing herein or in the last recited Act contained shall be construed to authorise the Postmaster-General to require the conversion of a regular mail train into an ordinary train." This, which is a qualification or restriction of the power to require the mail to be carried as a passenger's luggage, may fairly be considered to be co-extensive with it, that is, to relate to those cases only in which the power might be exercised. Whatever was the apprehended mode of converting a mail into an ordinary train, there is no doubt that it was the abuse of the power by such an Act that was

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intended to be guarded against and prohibited, and that as such an abuse could only take place when there should be a mail train, that is, a contract to carry the mail, it was in that case alone that the power was to exist.

The construction which, on the whole, I think most likely to be that intended is, that both the provisions of this clause extend to the case of Companies under contract to carry the mails. I cannot say that the case is by any means free from doubt, and am glad that our opinion can be reviewed, though the better course would seem to be to have the Act amended, as the delay attending an appeal must be followed with much public inconvenience.

CRAMPTON, J.

It is difficult to put any sensible construction on the statute; and though I have doubts as to the judgment, I yield to the opinion of the Court.

PERRIN, J. and MOORE, J., concurred with the CHIEF JUSTICE.

Demurrer overruled, and judgment for defendants.

M. T. 1850.
Common Pleas.

In the Matter of the Estate of
 THE TRUSTEES OF WILLIAM EDMOND REILLY,
 Owners and Petitioners.

(*Common Pleas.*)

Nov. 12.

THIS was a case sent by the Commissioners for the Sale of Incumbered Estates in Ireland for the opinion of the Court of Common Pleas under the 12 & 13 Vic. c. 77, s. 15.

By an indenture dated the 1st of January 1821, and expressed to be made between the Most Honorable the Marquis of Downshire of the one part, and Samuel Williamson of the other part, the said Marquis demised certain premises in the town of Hillsborough: "To have and to hold all and singular the said demised premises "(except as before excepted) unto the said Samuel Williamson, his "heirs, executors, administrators and assigns, from the 1st day of "November last past, for and during the natural lives and life of "their Royal Highnesses Frederick Duke of York, William Henry "Duke of Clarence, and Ernest Augustus Duke of Cumberland, and "for and during the life and lives of the survivors and survivor of "them, and for the term of ninety-nine years, whichever shall last "the longest." The interest of Williamson the lessee under this lease became vested in William Edward Reilly, and some of the *cestui que vie*s are still living. The question submitted by the Commissioners for the Sale of Incumbered Estates for the opinion of the Court was, whether the Commissioners had jurisdiction under the provisions of the 12 & 13 Vic. c. 77 to sell the premises comprised in this lease?

By indenture dated the 1st of January 1821, certain premises were demised to S. W., his heirs, executors, administrators and assigns, for the lives of A, B and C, "and for and during the life and lives of the survivors and survivor of them, and for the term of 99 years, whichever should last the longest." *Held*, on a case submitted by the Commissioners for the Sale of Incumbered Estates in Ireland for the opinion of the Court of C. P., that the Commissioners have not jurisdiction under 12 & 13 Vic. c. 77 to sell premises held under such a lease.

Hamilton Smythe, for the petitioners.

The question in this case turns upon the construction of the 16th
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M. T. 1850. section.* The word "term" is equally applicable to an estate for
Common Pleas. life as for years, and is so pleaded; 2 *Chit. on Pl.* p. 562; *Thursby*
In re v. *Plant* (a); it may therefore be properly employed in describing a
 REILLY. a term such as the present. The case of *Long v. Rankin* (b) is a
 decision that the proper construction of this lease is to convey to the
 lessee an interest not only for the term of three lives, but for the
 remainder of a term of ninety-nine years, to be computed from the
 date of the lease, in the event of the three *cestui que vies* dying
 within that term; if so, this lease having been made in 1841, there
 must at all events be an unexpired term of sixty-nine years.—
 [MONAHAN, C. J. Are you aware whether it has been decided in
 the Incumbered Estates Court whether the Court have power to sell
 a reversionary term expectant on a life estate?—I am not aware
 that there has been any decision on that point. To hold that the
 Commissioners have not power to sell this term would lead to this
 absurdity, that a tenant under such a lease might underlease for a
 period of sixty years; the derivative interest would then be saleable,
 while the estate from which it was derived could not be sold.—
 [BALL, J. That would equally apply to a tenant for life, who might
 make a lease for a thousand years.]

The following cases were cited: *Lessee Midland Great Western*
Railway Company v. Craig (c); *Vignolles v. Bowen* (d).

Reilly, contra, cited *Jones v. Duggan* (e); *Pike v. Byre* (f).

(a) 1 Saund. 231.

(b) 2 Sugd. on Pow. 539, Appx.

(c) 2 Ir. Law Rep. 1.

(d) 12 Ir. Eq. Rep. 199.

(e) 4 Ir. Law Rep. 91.

(f) 9 B. & C. 909.

* Which enacts, "That where land or a lease in perpetuity, or any lease for a term whereof not less than sixty years shall be unexpired at the time of such application as hereinafter mentioned, or any church or college lease of land in Ireland shall be subject to any incumbrance, it shall be lawful for the owner of such land or lease, within three years from the passing of this Act, to apply to the Commissioners for a sale of such land or lease under the provisions of this Act."

MONAHAN, C. J.

The legal effect of the present lease is a demise of three lives and so much of the term of ninety-nine years as shall be unexpired at the termination of the three lives. As a freehold interest it is not contended to be within the Act; and as a chattel it is not yet a chattel in possession; nor is it certain in legal contemplation that it ever will be a chattel of the required duration, and it is therefore not within the Act. We shall send a certificate to that effect.

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In re

REILLY.

The Court sent the following certificate :—

We have considered this case, and have heard it argued by the learned Counsel for the petitioners, and we are of opinion that the Commissioners for Sale of Incumbered Estates in Ireland have not jurisdiction under the Act of the 12 & 13 Vic. c. 77 to sell premises under a lease for the term of three lives and ninety-nine years, whichever shall last the longest.

(Signed)

JAMES HENRY MONAHAN.

ROBERT TORRENS.

N. BALL.

J. D. JACKSON.

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Nov. 12,
 14, 15.

JOHN FERGUS HEENAN v. JOHN MARCUS CLEMENTS.

In an action against the acceptor on a bill of exchange, drawn by L. J., indorsed by him after maturity to H. L. F., and by him to the London and Dublin Banking Company, of which the plaintiff was public officer, the plaintiff, in order to prove consideration between J. L. and H. L. F., gave in evidence a document in the handwriting of the former, dated during the currency of the bill, in which he stated that he held the bill for collection, and that H. L. F. had an interest in it to the amount of £700, and also the *Nisi Prius* record in an action by H. L. F. against L. J. in England. Held per MONAHAN, C. J.; that both documents were properly received in evidence.

Assumpsit by the plaintiff as the public officer of a Banking Company called "The London and Dublin Bank," who were the indorsees of a bill of exchange, dated the 5th of August 1847, drawn at two months by one Lewis Joel, and accepted by the defendant.

The declaration contained two special and the usual *indebitatus* counts.

Plea—Non-assumpsit.

The case was tried before BALL, J., at the Sittings after last Trinity Term, when a verdict was obtained for the plaintiff for the sum of £700.

On the production of the bill at the trial it appeared to have been indorsed after maturity by Lewis Joel to Henry Laurence Forrest; it also appeared that H. L. Forrest, who was an officer of the Bank, and, as alleged by the plaintiff, had cashed the bill in question with money belonging to them, had, before indorsing it commenced an action in England, either for his own benefit or as trustee for the Bank, against Lewis Joel on account, amongst other demands, of the bill in question. The case of *Forrest v. Joel* was brought down for trial at the Croydon Summer Assizes 1849, and was then withdrawn on a compromise, part of the terms being that Joel should give up the bill, which was accordingly done. H. L. Forrest having obtained possession of the bill, a writ was served in his name on the defendant in England on foot of it, but no further proceedings were taken in that action; H. L. Forrest having left the country for America, and the defendant having in consequence required security for costs. The defendant impeached the bill as a forgery and

An action having been commenced in England by H. L. F. against the defendant the proceedings in which were afterwards discontinued.—*Quære*, Whether the pendency of that action was a bar to the present?

The cases of *Columbies v. Slim* (2 Chit. 637), *Marsh v. Newell* (1 Taunt. 109), and *Jones v. Lane* (3 Y. & C. 281), commented upon.

required the plaintiff to prove consideration for the acceptance and indorsements. It was admitted on the trial that Lewis Joel, the drawer of the bill, had been convicted of having forged the defendant's acceptance to it. The plaintiff, in order to prove consideration for the indorsement to H. L. Forrest, tendered in evidence a memorandum, proved to be in the handwriting of the drawer, which was in the following terms:—

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“Parsonstown, 27th September 1847.

“I hold the bill of J. M. Clements, due on the 8th of October, “for collection, in which Mr. Forrest has an interest to the extent “of £700—L. JOEL.”

This document was objected to on the part of the defendant, but was received in evidence by the learned Judge, subject to the objection. Counsel for the plaintiff then tendered in evidence the Nisi Prius record in the cause of *Forrest v. Joel*. This was objected to on the ground that it was only a Nisi Prius record on which no judgment had ever been entered, but was also received by the learned Judge, subject to the objection.

The defendant gave in evidence the writ served in the cause of *Forrest v. Clements*, and called upon the learned Judge to direct a verdict for him, on the ground that it appeared that that action was on foot of the same bill as that upon which the present action was founded, and was still pending, and that H. L. Forrest could not during the pendency of such action transfer to the London and Dublin Bank a right to sue upon this bill. This the learned Judge refused to do, and told the jury that the plaintiff was entitled to maintain his present action, notwithstanding the pendency of the action of *Forrest v. Clements*.

R. C. Walker (with whom were *Brewster* and *O'Driscoll*) now moved that the verdict might be set aside and a new trial granted, on the ground of the admission of illegal evidence, misdirection by the learned Judge, and that the verdict was against the weight of evidence.

The bill upon which the present action is founded being an alleged forgery and indorsed to the Bank after maturity, it was

M. T. 1850. *Common Pleas.* incumbent on the plaintiff to prove that consideration had been given for it. Declarations of parties to a bill are only receivable in evidence against those identified with them in interest: *Phillips v. HEENAN* v. **CLEMENTS.** *Cole* (a). The document of the 27th of September 1847 was therefore not admissible in evidence against the defendant. Secondly, the record of the proceedings in *Forrest v. Joel* was not admissible; it was *res inter alios acta*, and could not affect the defendant: and the case having been compromised, there was no judgment. Thirdly, the plaintiff could not during the pendency of the cause of *Forrest v. Clements* indorse the bill to another so as to transfer a cause of action to him: *Columbies v. Slim* (b); *Jones v. Lane* (c); *Byles on Bills*, p. 127.

Whiteside (with whom were *J. D. Fitzgerald* and *Hickey*), for the plaintiff.

The document of the 27th of September 1847 was admissible to show the circumstances under which the bill was acquired. The rule that *res inter alios acta* is not admissible in evidence against the parties to a suit, does not apply where the document offered in evidence operates as a transmission of a right; this document is admissible not as a declaration but as an instrument in the nature of a deed of transfer.—[MONAHAN, C. J. As if an action were brought by the assignee of a reversion, and the assignment were impeached, you might give in evidence an agreement preparatory to the assignment though between third parties.]—This document would also be receivable in evidence as a part of the *res gesta*. The record in *Forrest v. Joel* was admissible to show the circumstances under which the bill was recovered. With regard to the question of misdirection, the pendency of an action at the suit of the same plaintiff in England would not be pleadable in abatement to an action afterwards brought in this country: *Bac. Abr. tit. Abatement*, M; *Foster v. Vassall* (d): and there is no reason why an indorsee should be in a different position. If a judgment were recovered in England in such an action it would not be conclusive,

(a) 10 Ad. & El. 106.

(c) 3 Y. & C. 281.

(b) 2 Chit. 637.

(d) 3 Atk. 587.

it would not change the nature of the security; *a fortiori*, the pendency of another suit cannot: *Harris v. Saunders* (a).

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Brewster, in reply.

Cur. ad. vult.

MONAHAN, C. J.

In this case, which was an action by indorsee against acceptor of a bill of exchange for £1000, the application was to set aside the verdict obtained by the plaintiff at the Sittings after last Trinity Term for the sum of £700. Three grounds have been relied on in support of this motion. Firstly, misdirection by the learned Judge by whom the case was tried; secondly, the reception of illegal evidence, and thirdly, that the verdict is against the weight of evidence. In relation to the question of misdirection, it is necessary briefly to advert to the facts of the case. The plaintiff sues as the public officer of a Banking Company, who are the holders of the bill in question, and he alleges that this bill was indorsed to the Company by a Mr. Forrest. It appeared in evidence at the trial that before the indorsement to the Bank, Forrest commenced an action upon the bill in question in one of the Superior Courts at Westminster in his own name. There was some allegation on the part of the plaintiff, that this action, though apparently brought by Forrest in his own behalf, was in fact an action brought in his name for the benefit of the Bank. The proceedings in that action were not continued, inasmuch as the defendant served a notice, requiring security for costs on the ground of the plaintiff Mr. Forrest being in America out of the jurisdiction. It was insisted at the trial by defendant's Counsel that as the action at Forrest's suit was pending he could not by indorsing the bill to the Bank give them a right to sue on foot of that bill in this country; and the misdirection complained of is that the Judge told the jury he did not consider the pendency of the action at Forrest's suit a defence to the present action.

Nov. 18.

The cases on this subject are collected by *Serjeant Byles* in his

(a) 4 B. & C. 411; S. C. 6 D. & R. 471.

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book on *Bills*, and have been referred to in the course of the argument. The earliest case in which the question arose was the case of *Columbie v. Slim* (a)—[states facts.]—In that case the Court decided that an indorsee *without notice* of an action pending at the time of the indorsement to him might maintain an action against the same party; but they intimated “that if an indorsee, with notice of “an action pending, commenced a new action with a view to oppress “the defendant, it might be otherwise.” This case it is clear cannot be considered as a decision in support of the present defence. So far as it is a decision it is one, that the plea in that particular case was insufficient; and from the manner in which the intimation was made on which the defendant relies, I confess it appears to me that the Court thought that the objection was to be made by motion to the Court to stay the proceedings rather than by plea, as otherwise how were the motives of the plaintiff to be made the subject of inquiry?

The next case referred to was that of *Marsh v. Newell* (b). In that case the plaintiff having arrested the defendant, the maker of a promissory note, and the defendant having executed a bail bond, the plaintiff indorsed the note to one Frost, who had also commenced an action in his own name and arrested the defendant, and the application was to cancel the bail bond and stay proceedings in the former action. The Court, however, discharged the conditional order which had been obtained for that purpose, being of opinion that as when the note was deposited with Frost he had notice of the action pending on it, the inference was that he consented the first action should proceed, and that he would not be permitted by the Court under these circumstances to bring a second action in the suit. This case cannot be considered as a decision that the pendency of an action at the suit of the holder discharges or suspends the negotiability of the instrument. It rather seems to suggest that the matter should be brought before the Court by motion.

The case however most relied on by the defendant's Counsel is *Jones v. Lane* (c), in which Alderson, B., is reported to have said

(a) 2 Chit. Rep. 637.

(b) 1 Taunt. 109.

(c) 3 Y. & C. 261.

(p. 294):—"In *Columbies v. Slim*, cited in Mr. *Chitty's Book upon Bills*, the Court of King's Bench held that an indorsement after "action brought on a note overdue would nevertheless give the indorsee a right of action, unless he had express notice of action. "Here the defendant had express notice of it, and I think an action "would lie at the defendant's suit on the bill."

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Now, with respect, to the opinion so delivered by Alderson, B. It was not at all necessary for the decision of the case. He decided on other grounds that the plaintiff was entitled to relief, and therefore dismissed the bill; and he states that if it had been necessary to decide the point which arises in the present case, he would probably have it argued before the full Court. Such appears to be the state of the authorities, if the action at Forrest's suit was one brought in this country or if both suits were pending in England.

Mr. *Fitzgerald*, for the plaintiff, argues, that even if the cases cited establish the proposition that the pendency of an action in this country at the suit of Forrest would be a good defence to the present action, still, as notwithstanding the action pending in England, Forrest might himself maintain a suit in this country, and the pendency of the suit in England could not be pleaded in abatement, his indorsee might maintain such an action. If this point of misdirection was the only ground for the application for a new trial, it would of course be necessary for the Court to decide it one way or the other; and so far as I individually am concerned, it would require a good deal more argument than I have yet heard to satisfy me that the pendency of the action at Forrest's suit constituted a good defence in the present case; and the question is one, if called on to decide, I should wish to have on the record, so that whatever conclusion we came to in this Court might, if the parties thought fit, be made the subject of consideration in a Court of Appeal; and as on other grounds we are all of opinion that a new trial must be had, we do not think it necessary or right to decide at present that point, as to the effect of the pendency of the action at Forrest's suit, more especially as there will be an opportunity of having the question made the subject of exception at a final trial, and what I have stated as to my present impression must be

M. T. 1850. considered altogether as my own and not that of the other Members
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The second question which arose was as to the admissibility of certain documentary evidence, one portion of it consisting of a paper in the handwriting of Joel, the drawer of the bill, the subject of the action, dated the 27th of September 1847, by which he states that he holds the bill for collection, and that Mr. Forrest had an interest in it to the extent of £700. The objection taken to this document was that it was nothing more than the declaration of a third party not on oath, and that as the defendant does not claim under that third party, this declaration could not be received in evidence. The answer given to this objection was, that there were several cases in which the acts of third parties were evidence against others, although they did not claim under them; and that as the indorsement of the bill by Joel to Forrest would of course be evidence, so would the agreement to indorse, followed by an actual indorsement, and as in the present case there was other evidence to show that money was in fact advanced by Forrest to Joel, so far as I individually am concerned I am of opinion that this document was properly receivable in evidence, to show the consideration and circumstances of the indorsement made by Joel to Forrest long after the bill became due. And on the same grounds I am also of opinion that the other documentary evidence objected to—namely, the proceedings in the cause of *Forrest v. Joel* were properly received in evidence. But this is to be considered merely as my opinion and not that of the other Members of the Court, who do not think it necessary to express any opinion on the subject, it not being necessary for the determination of the present application. The remaining question, and the one principally argued, was, that the present verdict was against the weight of evidence, and one that the Court should not consider so satisfactory as to be conclusive on the defendant.

It appeared in evidence that the defendant attained his age of twenty-one years on the 29th of July 1847. The bill of exchange was dated the 5th of August in the same year; it purports to have been drawn in London and accepted by the defendant, and we must

presume, in the absence of evidence to the contrary, that it was drawn at the time and place at which it bears date.—[States facts.]

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—There was certainly a great body of evidence on the part of the plaintiff to lead to the conclusion that the acceptance of the bill in question was in the handwriting of the defendant; and it was argued by plaintiff's Counsel that the accounts furnished by Joel to Mr. Pulman, and the statements made by him, were not properly received in evidence, and therefore that there were no grounds for setting aside the verdict. We, however, are clearly of opinion that as the bill was indorsed by Joel after it became due, and as the plaintiff's own evidence showed that the consideration between Joel and Forrest was only to the amount of £700, and as the action to the extent of £300 was or might be considered as one for Joel's benefit, that his declarations and statements, made while he was the holder of the bill, were admissible for the defendants; and therefore that the question arises, having regard to Pulman's evidence, can we consider the present verdict satisfactory, which in effect finds not only that the acceptance in question is the handwriting of the defendant, but that the bill was accepted by him subsequent to 29th of July, when he attained age, he having before he attained age been removed by his friends from Dublin to London, and there being no evidence whatsoever as to the circumstances under which the bill was accepted, or that Joel the drawer was in London at the time, in whose handwriting the body of the bill is, or when first it was seen by any one? As, however, there must be a new trial, I do not think it right to advert more at length to the facts or the impressions made by them on my mind.

The Court being all of opinion that a new trial must be had, not so much on the ground of the verdict being against the weight of evidence, as the probability, I may say the certainty, that the parties, and particularly the plaintiff, can on a further trial bring forward a great deal of additional evidence calculated to enable the jury to come to a sound conclusion on the subject. It appeared that Joel, the drawer of the bill, was convicted for forging the acceptance, still it was considered by Counsel on both sides that he was a competent witness, and he of course could give positive evidence on the subject; and therefore, without going further into the case, the order of the

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With respect to the costs of the former trial and of this motion, if no point existed in the case but the latter one, we should probably be of opinion that the defendant should pay the costs, as is usually the case when a verdict is set aside on the grounds of being against the weight of evidence. But as some legal points have arisen, particularly that as to the pendency of the action in England, which, if decided in defendant's favour, he ought not to pay the costs of the former trial, the rule as to costs will be, that if the plaintiff ultimately obtain judgment in the action, he shall have the costs of the former trial and of the motion as part of his costs in the cause; but if the defendant should ultimately obtain judgment, the parties are to abide their own costs of the former trial and of this motion.

Nov. 16,
 18, 19.

LYSTER *v.* ODLUM.

A declaration in debt contained a special count, and also counts for use and occupation, and on an account stated. The special count averred the execution of a lease by P. W. to J. D., the assignment of it to the defendant, and the descent of the reversion on the plaintiff, and that one and a-half year's rent was in arrear. The common counts related to other lands which the defendant held under an accepted proposal. The defendant pleaded *nil debet* and paid money into Court generally. *Held*, that the defendant was not at liberty to apply such payment to any particular count of the declaration, but that it admitted his liability upon all.

DEBT.—The declaration contained three counts. The first count stated that by a certain indenture dated the 1st of May 1813, made between Patrick Wyer of the one part and John Dunne of the other part, the said Patrick Wyer released unto the said John Dunne, his heirs and assigns, a certain piece of land described in the said indenture, and in the actual possession of the said John Dunne, then being by virtue, &c., for three lives, at a rent of £1. 17s. 6d. an acre, payable on the 25th of March and 29th of September in

The plaintiff having given notice to show the amount of rent due out of the premises comprised in the first count, *Held*, that he did not thereby preclude himself from relying on the defendant's admission by payment of money into Court.

The case of *Drake v. Lewis* (4 Tyrw.) explained.

each year. It then averred the death of Patrick Wyer in the year 1816, leaving two daughters, Ellen and Catherine, and the descent of the reversion upon them as co-heiresses in co-parcenary of Patrick Wyer. It then averred the death of Catherine, leaving a daughter Catherine Brennan her heiress-at-law; and that by an indenture dated the 15th of May 1819, and made between the said Ellen Wyer of the one part and Catherine Brennan of the other part, Ellen Wyer released to Catherine Brennan her interest in the reversion. It then averred the marriage of the plaintiff in the year 1843 with Catherine Brennan. It then averred "that after the making of the said indenture of lease, and during the said term thereby granted, to wit on the 1st of January, A.D. 1840, at the place aforesaid, all the estate and interest of the said John Dunne of and in the said premises, by assignment thereof then and there legally made, came to and vested in the said defendant;" and that one and a-half year's rent was in arrear.

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The second count was for use and occupation, and the third for money due on an account stated.

The particulars of the plaintiff's demand were stated to be £200 for the amount of rent and arrears for use and occupation due out of defendant's holding in the lands of Derreen.

The defendant pleaded *nil debet*, and paid a sum of £17 into Court generally upon the whole declaration.

The case came on for trial before Lefroy, B., at the Summer Assizes of 1850 for the King's County, when a verdict was obtained for the defendant.

On the trial the plaintiff proved the lease of the 12th of May 1843, an attested and compared copy of the rule to lodge money, and the officer's receipt for it; that the defendant was in possession of the land comprised in the lease of 1813 for four or five years preceding the trial, and a proposal by the defendant which related to the premises comprised in the second count, and which was in the following terms:—

"SIR—I propose to give you the same annual rent for the Baron's field that I now pay for the large farm I hold from you, by your giving me a lease for the same.

HENRY ODLUM."

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Accounts were also given in evidence in the handwriting of the defendant, by which he debited himself with rent amounting to that of both farms.

Evidence was given on the part of the defendant to show that Thomas Odlum, a brother of the defendant, had been in possession of the premises comprised in the lease of 1813 in the year 1843, and that no assignment had been executed by him to the defendant, but that he had permitted the defendant to occupy the premises for five years, which expired before the commencement of the present action; and that the defendant had settled with him by an allowance on account of the last half year's rent. On cross-examination it appeared that the witness had become insolvent, and the Judge reported his evidence to be very unsatisfactory. Counsel for the plaintiff objected to the admissibility of such evidence, and at the close of the case called upon the learned Judge to direct a verdict for the plaintiff for the amount of the rent found to be due out of the premises comprised in the first count (it being admitted that the payment into Court covered the claim for use and occupation) on the ground that the defendant, by paying money into Court on the declaration generally, had precluded himself from denying that he was assignee of the lease of the 13th of May 1813. The learned Judge however refused to do this, but reserved liberty to the plaintiff to move to have a verdict entered for him for the amount of the rent due in case the Court should be of opinion that the defendant was precluded by the lodgment of the money in Court.

A conditional order having been obtained for that purpose—

Macdonogh (with whom were *H. Hamilton* and *H. Smythe*) now showed cause.

The payment of money into Court upon this rule was not a conclusive admission of the liability of the defendant as assignee of the lease of the 12th of May 1813, but only amounted to evidence from which the jury were at liberty to draw such a conclusion: *Mellish v. Allnutt* (a).—[JACKSON, J. The question in that case seems to have been rather what the contract really was, than whether the

(a) 2 M. & S. 106.

lodgment in Court admitted that contract.]—A plaintiff after payment of money into Court by the defendant may be nonsuited: *Rucker v. Palsgrave* (a); *Horsburgh v. Orme* (b). The case of *Drake v. Lewin* (c) shows that the Court will decide upon what part of the case the money is paid in, and that if there are different demands it will limit the effect of payment to such of the demands as may be right.—[MONAHAN, C. J. In that case, which was an action founded on a variety of dealings between the parties, all that the payment of money into Court could admit would be a contract entitling the plaintiff to nominal damages, and it could not be said that there was an admission as to which of the transactions the payment applied, it was necessary therefore for the plaintiff to produce evidence to show that.]—In the case of *Bulwer v. Horne* (d), which will be relied upon on the other side, there was but one contract.

The following authorities were relied upon:—*Kingham v. Robbins* (e); *Stapleton v. Noel* (f); *Charles v. Branker* (g); *Steavenson v. The Corporation of Berwick* (h); *Hyde v. Moakes* (i); *Paul v. Simpson* (k).

Plunket (with whom was *F. Meagher*), in support of the conditional order.

The particulars of the plaintiff's demand show that there were two separate claims. Where a declaration contains only common counts in *indebitatus* assumpsit the payment of money into Court only admits the defendant's liability to the extent of the sum actually paid. Where a declaration contains several counts founded on the same transaction, the payment of money into Court cannot be considered as an admission of several inconsistent contracts. In *Drake v. Lewin* the declaration contained several counts, some charging the defendant as a *del credere* factor, and others as an ordinary factor, on a variety of dealings between the parties; the plaintiff insisted that

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(a) 1 Camb. 557.

(d) 4 Tyr. 730.

(e) 5 M. & W. 94.

(g) 12 M. & W. 743.

(i) 5 C. & P. 42.

(b) *Ibid* in *notis*.

(d) 4 B. & Ad. 132.

(f) 6 M. & W. 9.

(h) 1 Q. B. 154.

(k) 15 L. J., N. S.; Q. B. 382.

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he was entitled to apply *all* the dealings between the parties to the contract stated in the first count, by which the defendant was charged as a *del credere* factor; but the Court held that the lodgment of money only admitted a contract for the delivery of *some* goods upon that contract, and that letters written by the plaintiff were admissible to disprove the defendant's liability on the *del credere* contract stated in the first count. In *Mellish v. Albutt* there was a special verdict in which all the facts must be found, and that is the only case in which the payment of money is treated as evidence. If the payment of money in this case does not admit the assignment, it may with equal justice be argued that it does not admit the execution of the lease of 1813.

The following cases were relied upon:—*Cox v. Parry* (a); *Gutteridge v. Smith* (b); *Yate v. Willan* (c); *Andrews v. Palsgrave* (d); *Stoveld v. Brewin* (e); *Dyer v. Ashton* (f); *Long v. Greville* (g); *Attwood v. Taylor* (h).

H. Hamilton, in reply.

If the plaintiff intended to rely upon the estoppel he should not have gone into evidence.—[MONAHAN, C. J. It was necessary to go into evidence to show the amount of rent due.—JACKSON, J. Have you any case establishing that where a defendant pays money into Court generally upon a declaration consisting of special and general counts, the plaintiff, if he gives any evidence beyond the payment of money, precludes himself from relying upon the estoppel?—The payment of money did not admit the defendant's character, the plaintiff was therefore bound to prove the fact of assignment.

The following cases were cited:—*O'Brien v. Hamilton* (i); *Finlayson v. Mackenzie* (h); *Ravenscroft v. Wise* (l); *Browne v.*

(a) 1 T. R. 464.

(b) 2 H. Bl. 374.

(c) 2 East, 127.

(d) 9 East, 325.

(e) 2 B. & Ald. 116.

(f) 2 D. & R. 19; S. C. 1 B. & C. 3.

(g) 4 D. & R. 632; S. C. 3 B. & C. 10.

(h) 1 Scott's N. R. 640.

(i) 6 Law Rec. N. S. 137.

(k) 3 Bing. N. C. 324.

(l) 1 C. M. & R. 203.

Thompson (a) ; *Robinson v. Ward (b)* ; *Tattersall v. Parkinson (c)* ; *Rosling v. Muggeridge (d)*.

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MONAHAN, C. J.

As we have had ample opportunity of referring to and considering the several cases which have been relied on by the defendant's Counsel, we do not think it necessary to take further time to consider our judgment. We do not entertain any doubt that the payment of money into Court upon a special count such as the present admits the facts which constitute the special contract, that is in the present case the execution of the lease of 1813, the assignment thereof to the defendant, and the vesting of the lessor's interest in the plaintiff. It was scarcely argued that if the declaration contained only the special count, payment of money into Court would not have the effect I stated, and we do not think that the circumstance of their being also other counts in the declaration makes any difference, nor will our decision in this case in any degree conflict with the case of *Drake v. Lewin*, on which the defendant's Counsel principally relied. In that case, though the counts were special, they were of that description that in case of a judgment by default would require evidence to show what particular dealings the plaintiff was entitled to recover on foot of under each count; and all that that case decided was that the plaintiff could not arbitrarily allege that any particular transaction between him and the defendant was on the terms stated in the particular count.

When the special counts are of the description they were in *Drake v. Lewin* the payment of money into Court has precisely the same effect as it has when the payment is made on the common counts, and altogether different from a case like the present, where, if judgment had gone by default, and the action were covenant and not debt, we would have referred it to the officer to ascertain the amount due to the plaintiff, as in cases of actions on bills of exchange.

The plaintiff is therefore entitled to have the verdict entered for him pursuant to the leave reserved.

(a) 4 Q. B. 543.

(c) 16 M. & W. 760.

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(b) 8 Q. B. 920.

(d) Ibid, 181.

M. T. 1850.
Common Pleas.

WILLIAM LADD,
 Lessee of THOMAS HENRY WATSON and others,
 v.
 PATRICK CLOONEY.

Nov. 21, 22.

An instrument in writing made between landlord and tenant, and dated the 25th of July 1846, expressed that it was thereby agreed between the parties thereto that P. C. (the tenant) is to have a lease of the lands of B. for his own life at an acreable rent, payable half-yearly, the first payment to be made on the 29th of September then next, and that both parties should abide their costs of a pending ejectment. *Held*, that as the instrument could only operate as an agreement to grant a lease for the life of P. C., it was properly stamped with a 2s. 6d. stamp.

Sembla—The word "release" in the 8 & 9 Vic. c. 108, s. 3, seems to be a misprint for "lease."

EJECTMENT for non-payment of rent.—The case was tried before Mr. Serjeant Stock at the Summer Assizes of 1850 for the county of Kilkenny, when a verdict was obtained for the lessors of the plaintiff.

Proof having been given on the trial of the service of the declaration in ejectment, and of an admission by the defendant that a year's rent was due on account of the lands comprised in the ejectment, it was proposed in support of the ejectment to give in evidence the following document, signed by the defendant and Thomas Henry Watson, one of the lessors of the plaintiff.

"It is agreed upon by and between the parties hereto—namely,
 "Thomas Henry Watson, of Lumcloon in the county of Carlow,
 "and Patrick Clooney, of Butlersgrove in the county of Kilkenny,
 "farmer, of the other part, viz., that he the said Patrick Clooney
 "is to have a lease of the lands of Butlersgrove in the county of
 "Kilkenny, containing fifty acres, three roods and seven perches,
 "late Irish plantation measure, subject to survey, and to be inclusive of one-half of the road now making and hereinafter mentioned,
 "and the same to be held from the 25th of March last for his the
 "said Patrick Clooney's life, at a yearly rent of £2. 2s. 6d. per
 "Irish acre, payable half-yearly on every twenty-fifth of March and
 "twenty-ninth of September in each year, the first payment to be
 "made on the twenty-ninth of September next; the above holding
 "to be exclusive of the old avenue, which is to belong solely to
 "the said Thomas H. Watson, being that part thereof opposite to
 "the part of said lands called Brennan's field, now in possession of

"Joseph Byrne; and also reserving a right of way from the high
 "road to Goresbridge up to the old avenue leading to the stable
 "now in the possession of the said Thomas H. Watson, his heirs
 "and assigns, and his and their servants, labourers and workmen,
 "and all other persons authorised by him and them or any of them;
 "and also reserving to the said T. H. Watson the stable now in his
 "possession; the balance of the half-year's rent due the twenty-fifth
 "of March last to be paid down on or before the sixteenth day of
 "August next; and both parties to abide their own costs of the
 "present ejectment suit pending between the parties hereto.—Given
 "under our hands this 25th day of July 1846."

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This instrument being stamped with a two-and-sixpenny stamp, Counsel for the defendant objected to its admission, on the ground that it operated as a present demise and should have been stamped as a lease, and called upon the learned Judge to nonsuit the plaintiff. The learned Judge having refused so to do, and told the jury that if they believed the evidence given on the part of the plaintiff to find for him, the Counsel for the defendant excepted to his Lordship's charge. The case now came on for argument on a bill of exceptions to his Lordship's charge.

R. Armstrong, for the defendant.

The question in this case is, what is the construction to be given to the document of the 25th of July 1846, whether it operates as a demise or only as an agreement for a demise? The intention of the parties was evidently that the defendant should have a present interest in the lands. There is no provision for the execution of a lease, nor any thing left undetermined in specifying the contract. The term, the rent, and the interest of the lands demised are all defined. In *Maldon's case* (a), which was before the Statute of Frauds, it was decided, "That if one saith to me, you shall have a lease of my lands "in D for twenty-one years, paying therefore ten shillings per "annum, make a lease in writing and I will seal it," this is a good lease by parol although no lease was executed. And in *Drake v. Munday* (b), *H. T.* 6 *C.* 1, where A B covenanted, granted and

(a) *Cro. Eliz.* 33.

(b) *Cro. Car.* 207.

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agreed with the defendant that he shall have and enjoy such a house and lands for six years, and the defendant covenants, grants and agrees to pay the rent, it was held that this amounts to a demise with reservation of rent. No question can arise under 7 & 8 Vic. c. 76, as that statute was repealed by 8 & 9 Vic. c. 106, before the execution of this document; and the word "release," which occurs in the third section of the latter statute, is evidently a mistake for lease. —[MONAHAN, C. J. The word "release" does not occur in the previous part of the section; a release could not be otherwise than by deed.]—The words "release and surrender" occur together in the previous part of the section. The words "is to have a lease" must, when taken in connection with the fact of the defendant being in possession at the time, mean that he is thereby to have a lease: *Poole v. Bentley* (a); *Doe d. Walker v. Groves* (b); *Doe d. Phillip v. Benjamin* (c); *Chapman v. Black* (d). —[MONAHAN, C. J. The only difference between those cases and the present is, that the operative words here are at the commencement, as if the meaning of the instrument were, I agree to execute a lease containing the following provisions.]—In interpreting the words "is to have a lease," the fact that the rent was to commence from a past period, and that present possession was given, must be considered: *Handcock v. Caffyn* (e); *Pearce v. Cheslyn* (f); *Staniforth v. Fox* (g); *Worthington v. Warrington* (h); *Roe d. Jackson v. Ashburner* (i); *Jones v. Reynolds* (k); *Browne v. Warner* (l).

Deane (with whom was *Martley*), contra.

This instrument is properly stamped as an agreement.—[MONAHAN, C. J. We are all of opinion that if this instrument amounts only to an agreement for a demise, it is properly stamped.]—It cannot amount to a demise, for it purports to convey a freehold interest, and should therefore be under seal. By 8 & 9 Vic. c. 106,

(a) 12 East, 168.

(c) 1 P. & D. 440.

(e) 1 M. & Sc. 521.

(g) 5 M. & P. 589.

(i) 5 T. R. 163.

(b) 15 East, 244.

(d) 4 Bing. N. C. 187.

(f) 5 N. & M. 652.

(h) 5 C. B. 635.

(l) 1 G. & D. 62.

(j) 14 Ves. 156.

feoffments must be under seal. The case of *Stone v. Rogers* (a) M. T. 1850. is an authority decisive of the present case. *Common Pleas*

The following cases were cited: *Greene v. Wood* (b); *Hayden v. Ward* (c); *Phillips v. Hartley* (d).

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Lynch, in reply.

We insist upon two propositions:—first, that this is a demise; second, that the only operative effect of this to maintain the plaintiff's ejectment is by treating it as such. The words "is to have a lease" must mean either that the defendant is thereby to have a lease or that he is thereafter to have a lease: *Com. Dig.* tit. *Estates*, G, tenants for years. If the former be the construction, this instrument confessedly is improperly stamped. There is no such rule as that a freehold interest must be created by an instrument under seal, *Co. Lit.* p. 41 a; and if necessary to give validity to it as creating a freehold interest, livery of seizin must be presumed. But, secondly, the only construction of this instrument under which the plaintiff can recover is by treating this as a legal demise for the life of Patrick Clooney; if not the defendant is only tenant from year to year, and an ejectment for non-payment of rent cannot be maintained against him under the statutes. This is an ejectment under 25 G. 2, c. 13; and to entitle the plaintiff to recover, he must prove that there was an article, minute or contract in writing between the landlord and tenant concerning the lands, ascertaining the rent, and that the defendant held under it: *Warner v. Martin* (e); *Jack d. Thompson v. Home* (f). If this instrument does not amount to a legal demise the ejectment for non-payment of rent cannot in the present case be sustained. There is no evidence that the premises were held under the article in question.—[MONAHAN, C. J. This is not so; as if a written agreement be entered into between the parties as to the letting of land, and no lease executed, so that no legal estate is thereby created, it is quite clear that if one of the parties enters into possession and pays rent under such agreement, he thereby becomes at law merely tenant from year to year, yet the

(a) 2 M. & W. 448.

(b) 7 Q. B. 178.

(c) 2 Ir. Jur. 189.

(d) 3 C. & P. 121.

(e) 3 Ir. Law Rep. 79.

(f) 1 J. & S. 424.

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terms of the holding being ascertained by a written contract, the ejectment for non-payment of rent can be sustained; and in the present case probably the fair inference from the evidence of Mr. Halford, who stated that the defendant Clooney admitted the day before the trial that he owed Mr. Watson a year's rent is, that the defendant Clooney held and paid rent under the article in question. But be this as it may, the objection is not now open. On a bill of exceptions it is not necessary to set out *all* the evidence; it is necessary and right to set out only so much as to make the exception intelligible, and we cannot infer from the bill of exceptions in the present case that there may not have been other evidence to show that Clooney held under this article. In order to raise your present objection, when the Judge received this instrument in evidence you should then have insisted that the article of agreement did not sustain the ejectment, on the ground that no possession was proved under it, or that it was not an article, contract or minute such as required by the statute.]

The following cases were cited :—*Leader v. Duggan* (a); *Shen-ton v. Corbally* (b).

MONAHAN, C. J.

The only question we have to consider is, whether the instrument of the 26th of July 1846 is properly stamped? This is the only exception taken which has been argued. It is quite clear that under the provisions of the Stamp Acts, if this instrument be an executory contract for a lease, it is properly stamped; but if it amounts to a legal demise, it is not. As this instrument purports, if it conveys any thing, to convey a freehold interest, which it could not effectually do, not being under seal, we think the only intelligible construction which we can give it is by treating it as a contract to execute a lease for the life of Patrick Clooney, and therefore the exception must be overruled.

It is unnecessary to consider what the construction of the instrument would be if the subject matter thereof was a chattel and not a freehold interest.

Judgment for the plaintiff.

(a) *Jebb & Bourke*, 3.

(b) 1 *Hog*, 430.

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CORBET v. MATTHEWS.*

(Exchequer.)

Nov. 8.

H. P. JELLETT moved the Court for liberty to add the costs to the judgment on the roll, under the following circumstances :—An arrangement had been entered into between the parties that the debt should be paid by instalments, and in consequence the costs were never taxed. Default having been now made by the defendant, the plaintiff has had his costs taxed, and now desires to have them added to the judgment.—[LEFROY, B. Does your affidavit state that the judgment has not been registered?]
Costs cannot be added to a judgment without an affidavit that the judgment has not been registered.

LEFROY, B.

The rule is that the affidavit must state that fact on an application of this nature.

* LEFROY, B., *sols.*

DEEGAN v. THE MARQUIS OF WATERFORD.*

Nov. 9.

TANDY, on the part of the defendant, moved that the venue in this case should be changed. He moves on certain facts attested upon the honour of the defendant.

Peers not exempt from making affidavits in the usual way when a proceeding is taken by them in an action at law.

O'Hanlon, for the plaintiff, objects that the privilege of a Peer

* PENNEFATHER, B., *sols.*

M. T. 1850. *Eschequer.* did not apply to a case like this, and that the defendant should have moved on affidavit.

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PENNEFATHER, B.

When a Peer answers a bill in Equity, his honour is sufficient ; but where a proceeding as here is taken, it should be, I think, on affidavit. Inquire into the practice and mention the case again.

Nov. 11. Mr. *Tandy* again mentions the case, and admits the rule to be, as stated by BARON PENNEFATHER on the former occasion, and that the application should be on affidavit. He refers to *Com. Dig.*, where it is laid down that "when they (*i. e.* Peers) answer as "defendants in any Court, the answer shall be upon protestation "of their honour, without oath; but if a witness make an affidavit, "it must be on oath." He also referred to the authorities below (*a*).

PENNEFATHER, B.—No rule on the motion.

(a) *Com. Dig.* tit. *Terement C.* 333; *Com. Dig.* tit. *Dig. B.* 3, 444; Sir W. Jones' Rep. 154; *Bac. Abridg.* tit. *Priv.* 558; Dyer, 314; *Sir Thomas Meer v. Lord Stourton* (2 Salk. 512).

MURRAY v. BUTLER.*

Nov. 9.

The sum of £1 for registering judgments to be added without taxation to the £5 for costs of cases within the 19th section of the Practice and Process Act.

MR. TUDOR applied for an order of reference to the Taxing-officer to tax the costs of registering the judgment pursuant to the 13 & 14 *Vic.* c. 74, s. 11 in this case. The judgment was obtained upon a plea of confession. By the 19th section of the Practice and Process Act the costs were in such cases limited to £5, to be added

* LEFROY, B., *solum*.

by the officer of the Court, and no taxation of them on the part of the plaintiff was to take place. On that ground the Taxing-officer considers that he has no jurisdiction to tax in this case, and to add the costs of registering the judgment pursuant to the latter Act.

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The 13 & 14 Vic. c. 18 s. 19, prescribes the sum of £5 as the amount of costs to be added in cases like the present; but the 13 & 14 Vic. c. 74, s. 11, which is a late Act, prescribes that the costs of registration are also to be allowed; but what are the costs of registration? How are they to be ascertained? My opinion is that those costs should either be taxed, or that a certain sum should in all cases be added for registration; if there be a statutable sum, that should be it; but if there be no such sum, and that it is necessary to satisfy the exigency of the second statute, that the costs should be taxed; the Taxing-officer should tax them. At present I shall merely intimate that it would be desirable that the Taxing-officer should ascertain a proper sum to be allowed for the costs of registering a judgment, and that sum should for the future be added without any taxation.

On this intimation the Taxing-officer taxed the costs of registration, and stated that a proper sum to be fixed for the costs of registration of judgments would be £1. 2s.*

* NOTE—Since the above case the point has been settled by the 160th New Rule—“The officer, in awarding the costs of judgment on confession, and by default, under the 19th section of the 13 & 14 Vic. c. 18, as well as of judgments on bonds and warrants of attorney, shall, on production of the certificate of the registration of any such judgment under the 13 & 14 Vic. c. 74, add to the costs therein the sum of £1 as and for the costs of such registration.”

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MILLER v. MAUNSELL.*

Nov. 16.

In an action of assumpsit on a bill of exchange, when interlocutory judgment obtained by the plaintiff on parliamentary appearance, and final judgment on officer's report, the judgment is a judgment by default, and recovered in an action for liquidated sum within the meaning of the 2nd section of Practice and Process Amendment Act.

Jebb moved for the plaintiff that the officer be directed to add £5 for costs to the amount of the judgment in this case, or that the Taxing-officer be directed to tax the plaintiff's costs. This was an action of assumpsit on a bill of exchange for £13. 10s., together with interest and the costs of protest interlocutory. Judgment was obtained against the defendant on a parliamentary appearance. Final judgment was obtained on an order to tot and officer's report thereon. The officer refused to add £5 for costs pursuant to the 19th section of the Practice and Process Act, and the 2nd section of the Practice and Process Amendment Act, as this was not a judgment by default but a judgment on the officer's report, nor was it an action brought for the recovery of a liquidated sum. The Taxing-officer refused to tax the costs, on the ground that the case was within the section of the Acts referred to, and that therefore the costs were not taxable.

Jebb refers to the 2nd section of the Practice and Process Act, and argues that this action was not brought for the recovery of a liquidated sum, and is therefore not included in that section.—[PENNEFATHER, B. I think the words of the Act are not only too strong for you, but that it would be quite against the spirit of the Practice and Process Act to go with you in that argument.]—There is this difficulty with respect to the amended Act, that it does not mention judgments on pleas of confession; if then it does not repeal the Practice and Process Act as to judgments on pleas of confession, such judgments for any amount can only carry £5 costs; and further, the 19th section of the Practice and Process Act mentions pleas of confession, which only apply to actions of assumpsit, and that therefore the Act does not apply to actions of

* PENNEFATHER, B., *ad hoc*.

debt where a consent for judgment is given, which is not mentioned in the Act.

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PENNEFATHER, B.

That is not the case ; a plea of confession is equally good in debt, though a consent for judgment is the more usual practice. With respect to the other point, it does not arise here, and I express no opinion. I think the present case is within the 2nd section of the Practice and Process Amendment Act ; it is a judgment by default, and recovered in an action brought for a liquidated sum.

Let the officer add £5 for costs.

SHEERAN, Administratrix, v. SAUL.*

Nov. 21.

CURRAN applied to the Court on behalf of the plaintiff for liberty to sue *in formâ pauperis*. The affidavit set forth *inter alia* that the plaintiff was not worth £5, and that she was beneficially interested in the assets, and relied on the circumstance of the plaintiff being beneficially interested in the assets as making an exception to the rule that an administrator could not sue *in formâ pauperis*.

An administratrix beneficially interested in the assets may sue *in formâ pauperis*.

PENNEFATHER, B.

It is not usual to allow administrators to sue *in formâ pauperis* ; but the party being beneficially interested, makes a difference. You may take the rule.

* PENNEFATHER, B., *solus*.

M. T. 1850.

Exchequer.

COWAN v WALKER.*

Nov. 21.

Where in an action of debt a plea of confession was of such a form that judgment could not be entered thereon, and the defendant refused to give a consent for judgment, the Court ordered that a plea of the general issue that had been filed be set aside and judgment entered for the plaintiff.

ARCHER, on behalf of the plaintiff, applied pursuant to notice for liberty to mark judgment in this case, or that the attorney for the defendant be directed to substitute a consent for judgment for the plea of confession which he had given, and for the costs of the motion.

The affidavit on which the motion was grounded stated that this was an action of debt, and that the attorney for the defendant had erroneously given a plea of confession; that the officer refused to enter judgment thereon, the action being in debt. That the plaintiff's attorney had applied to the attorney for the defendant to give a consent for judgment; that he had refused so to do.

PENNEFATHER, B.

I think it is a mistake to say that judgment cannot be entered on a plea of confession in an action of debt as well as of assumpsit, although the usual practice is to have a consent for judgment in an action of debt. However, in this case the form of the plea is not applicable to an action of debt, and judgment therefore cannot be entered on it. I shall, however, by my order take care to effect the intention of the parties; and as I think there was a want of good faith on the part of the defendant in not giving the consent for judgment when applied to for that purpose, I shall grant the costs of the application.

ORDER.—That defendant's plea of the general issue in this cause be set aside, and that plaintiff be at liberty to mark judgment in this cause for the sum of £13. 10s. 5d., being the amount stated in said plea of confession, without further motion, and defendant to pay the costs of this motion to plaintiff.

* PENNEFATHER, B., *sols.*

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THE QUEEN v. SAMUEL OTWAY.*

(Court of Criminal Appeal.)†

Dec. 8, 10.

THE prisoner had been tried and convicted at the Commission of Oyer and Terminer for the county of the city of Dublin, held at Green-street in October 1849, before CRAMPTON, J., and BALL, J., on an indictment under 11 & 12 Vic. c. 2, "An Act for the better Prevention of Crime and Outrage in certain parts of Ireland."†

It appeared from the evidence on the trial that a proclamation under the said Act for the county of the city of Dublin was issued and published in the "Gazette" in the month of July 1848, and duly posted within the Castle Division of the district of Dublin metropolis; but there was no proof of any posting in the other divisions as directed by the second section of this Act.

Counsel for the traverser contended that evidence ought to be given of a posting in all the modes prescribed by this 2nd section.‡ The learned Judges, however, left the case to the jury, notwithstanding the deficiency of this proof, reserving the question for the consideration of this Court. The prisoner was convicted.

The case coming on to be heard—

The *Attorney-General*, for the Crown, abandoned the first count of the indictment, and stated he relied solely on the second count.

D., the prisoner, on the day and at the place specified in the proclamation, unlawfully, &c., did carry and have a certain pistol, not being licensed so to do, contrary to the form, &c.

The 2nd section of the Act (on which this indictment was founded) enacted that printed copies of every proclamation issued under the Act should, with an abstract of the provisions of the Act, be posted in certain specified places. *Held*, that the posting of this proclamation was not a fact necessary to be averred or proved to warrant this indictment.

Held also, that when an indictment contains distinct averments, one material and another immaterial, the immaterial may be rejected as surplusage; but if the whole averment cannot be struck out without getting rid of a material part, the whole must be proved.

* BLACKBURN, C. J., DOHERTY, C. J., PEBBIN, J., BALL, J., and JACKSON, J., presiding.

† For references see end of case.

An indictment found that, in pursuance of a certain Act of Parliament, by a proclamation duly published in the "Dublin Gazette," and duly posted, with an abstract of the provisions of the said Act at the foot according to the provisions thereof, after a certain day in said proclamation mentioned said Act should apply to and be in force in the county of D., and charged that after that day and whilst the proclamation was in force and not revoked, and whilst the Act did apply to the county of

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J. A. Curran, for the traverser.

The 11 & 12 Vic. c. 2, s. 2, makes it imperative on the Lord Lieutenant to have published and posted the proclamation and abstract in the manner directed thereby before any jurisdiction is created to try or punish for offences under this Act; and according to the authority of the cases cited in *Dwarrris on Statutes*, p. 704, on the proper construction of Penal Acts, the words of the 2nd section must be construed as mandatory, and a full compliance therewith is indispensable to give force and effect to the law; and further, the Crown having in the indictment averred the due publicity and posting, and that it was done in pursuance of the statute, they could not sever that averment and say that any portion thereof was immaterial, and therefore unnecessary to be proved.

The *Attorney-General* and *Solicitor-General*, contra.

The 2nd section is only directory; that is clear from the reading of the 9th section. In that latter section there is no mention whatever of posting, and the last count is framed according to its provisions; not so in the 11th section; there the publishing and posting of the notice, requiring all persons (save those exempted) to deliver up their arms within a given time, is expressly required pursuant to the provisions of that section; so it is quite manifest that proof of the due issuing and publishing of the proclamation is all that is necessary to support the charge under the 9th section in that respect.

But it is said that it being averred that such proclamation was posted as well as published pursuant to the statute, it must be proved as laid; that this was not the law is clearly demonstrative on authority. If the immaterial portion of a larger clause can be severed, and the remainder be a perfect sentence in itself, it may be rejected as surplusage.—[BLACKBURN, C. J. Can you disjoint or separate the parts of an averment without destroying the whole?]
 Yes, in this case it can be done; for if in one clause or sentence of an indictment there are consecutive averments of distinct facts, one of which is unnecessary to be proved, it may be rejected as surplusage, and yet the remaining portion be allowed to stand good, as is

distinctly ruled in the case of *The King v. Jones*, and several other cases, in which the position was indubitably established.

Cur. ad. vult.

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BLACKBURNE, C. J.

This case was reserved under the provisions of the Act of 11 & 12 Vic. c. 2, by the learned Judges who presided at the last Commission, and has been argued before us.

The question arose on the trial of an indictment which contained two counts, the first on the 12th and the second on the 9th sections of the Act 11 & 12 Vic. c. 2. The prisoner was convicted, and the objection on which we are to decide is, whether the proclamation, which issued and was published in the "Dublin Gazette" pursuant to the 1st section of this Act, should have been proved to have been posted in the manner prescribed by the 2nd section? As it was not contended before us that such proof had been made, and as the *Attorney* and *Solicitor-General* have rested the case and maintain that the conviction has been right on the second count, we are not called on to intimate any opinion except on the point to which the case was thus narrowed in the course of the argument—namely, whether it was necessary in support of the second count to have proved a posting of copies of the proclamation, with an abstract of the statute on the doors of all places of public worship, and of every police barrack in the proclaimed district. We are all of opinion that the 9th section did not make it necessary to aver more than that such a proclamation had issued and been published in the "Dublin Gazette" as the 1st section of the Act requires, and therefore that the posting of the proclamation is not a fact that need be averred or proved in order to warrant this indictment, and sustain the conviction under the 9th section for the offence of carrying or having arms elsewhere than in his dwelling-house by the party charged.

But then arises another and a different question thus; the indictment avers that the Lord Lieutenant and Privy Council, on the 20th of July 1848, did declare by proclamation duly published in the "Dublin Gazette," and then and there duly posted, with an abstract of the Act at the foot according the provisions of the statute, that

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after the 20th of July the Act should be in force in the city of Dublin. It is contended by the prisoner's Counsel that even though this averment of the posting was not necessary, yet having been made, it must be proved. On the other hand the *Attorney-General* contends that this averment of the posting of the proclamation not being necessary, may be rejected as surplusage, and therefore that the conviction is good although the posting was not proved. Though the words in the indictment form consecutive and connected parts of the same sentence, they are really distinct assertions of distinct facts; one, that the proclamation was published in the "Gazette," the other that it was posted according to the provisions of the Act. These are distinct, independent and unconnected facts that must happen in different ways and by different means, and must, if material, be each established by distinct and independent proof. If the latter be detached from the former, there will still remain a complete sensible averment of the issuing of the proclamation and its publication in the "Gazette," which is all the Act required to subject persons in the proclaimed district to its operation. This is sufficient to show that this case comes within the rule which the authorities establish, that if an averment may be entirely omitted without affecting the charge against the prisoner, and without detriment to the indictment, it will be considered surplusage, and may be disregarded in evidence. This rule was acted on in the case of *The King v. Jones (a)*—a case which, as an instance of its application, fully sustains our opinion, that the averment of the posting of the proclamation was not necessary, and need not therefore have been proved. It is scarcely necessary to refer to the cases (of which *Bristow v. Wright (b)* is the leading one), in which it is held that where the whole of an averment cannot be struck out without getting rid of an essential part, the whole must be proved.

But in addition to the reasons I have stated for holding the immaterial averment of the posting of the proclamation to be a distinct independent one, I may remark that it contains nothing which can by any possibility be understood to explain, qualify or

(a) 10 B. & Ad. 611.

(b) 2 Dong. 665.

give particularity to the material distinct averment of its publication in the "Dublin Gazette." The point reserved must be ruled for the Crown, the conviction on the second count being in my opinion valid.

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† This Court derives its jurisdiction under 11 & 12 Vic. c. 78, "An Act for the Further Amendment of the Administration of the Criminal Law." Sect. 1 enacts, "That when any person shall have been convicted of any treason, felony or misdemeanor before any Court of Oyer and Terminer, or Gaol Delivery, or Court of Quarter Sessions, the Judge or Commissioner or Justices of the Peace, before whom the case shall have been tried may, in his or their discretion, reserve any question of law which shall have arisen on the trial for the consideration of the Justices of either Bench and Barons of the Exchequer, and thereupon shall have authority to respite execution of the judgment on such conviction, or postpone the judgment until such question shall have been considered and decided, as he or they may think fit; and in either case the Court in its discretion shall commit the person convicted to prison, or shall take a recognizance of bail, with one or two sufficient sureties, and in such sum as the Court shall think fit, conditioned to appear at such time or times as the Court shall direct, and receive judgment, or to render himself in execution, as the case may be."

Sect. 2.—"That the Judge or Commissioner or Court of Quarter Sessions shall thereupon state, in a case signed in the manner now usual, the question or questions of law which shall have been so reserved, with the special circumstances upon which the same shall have arisen; and such case shall be transmitted to the said Justices and Barons, and the said Justices and Barons shall thereupon have full power and authority to hear and finally determine the said question or questions, and thereupon to reverse, affirm or amend any judgment, which shall have been given on the indictment or inquisition on the trial whereof such question or questions have arisen, or to avoid such judgment, and to order an entry to be made on the record, that in the judgment of the said Justices and Barons the party convicted ought not to have been convicted, or to arrest the judgment, or order judgment to be given thereon at some other Session of Oyer and Terminer or Gaol Delivery, or other Sessions of the Peace, if no judgment shall have been before that time given, as they shall be advised, or to make such order as justice may require; and such judgment and order, if any, of the said Justices and Barons, shall be certified under the hand of the presiding Chief Justice or Chief Baron to Clerk of Assize or his Deputy, or to the Clerk of the Peace or his Deputy as the case may be, who shall enter the same on the original record in proper form," &c.

Sect. 3.—"That the jurisdiction and authorities by this Act given to the said Justices of either Bench and Barons of the Exchequer shall and may be exercised by the said Justices and Barons, or five of them at the least, of whom the Lord Chief Justice of the Court of Queen's Bench, the Lord Chief Justice of the Court of Common Pleas, and the Lord Chief Baron of the Court of Exchequer, or one of such Chiefs at least, shall be part, being met in the Exchequer Chamber or other convenient place; and the judgment or judgments of the said Justices and Barons shall be delivered in open Court after hearing Counsel or the parties, in case the prosecutors or persons convicted shall think it fit that the case shall be argued, in like manner as the judgments of the Superior Courts of Common Law at Westminster or Dublin, as the case may be, are now delivered."

‡ The indictment contained the two following counts, one framed on the 11th section, and the other on the 9th section of 11 & 12 Vic. c. 2:—

County of the City of Dublin, } "The jurors for our Lady the Queen upon their
to wit. } oath do say and present that after the 20th day of

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December, which was in the year of our Lord 1847, to wit upon the 18th day of July, in the year of our Lord 1848, his Excellency the Lord Lieutenant of Ireland, by and with the advice of the Privy Council of Ireland, did in pursuance and execution of an Act passed in the eleventh year of the reign of our Sovereign Lady the now Queen, intituled 'An Act for the better prevention of Crime and Outrage in certain parts of Ireland until the 1st day of December 1849, and to the end of the then next Session of Parliament,' at Dublin, in the county of the city of Dublin, declare by proclamation, duly published in the Dublin Gazette, and then and there duly posted, with an abstract of the provisions of the said Act at the foot according to the provisions of the said Act, that from and after the 20th day of July 1848, in the said proclamation mentioned, the said Act should apply to and be in force for the county of the city of Dublin. And the jurors aforesaid upon their oath aforesaid do further say and present that after the said 20th day of July named in the said proclamation, and whilst the said Act was and continued to be in full force and effect in and for the said county of the city of Dublin, to wit upon the 21st day of July, in the year of our Lord 1848, at Dublin, within the said county of the city of Dublin, his Excellency the Lord Lieutenant of Ireland did by notice then and there duly published in the Dublin Gazette, and then and there duly posted according to the provisions of the said Act, require all persons not being Justices of the Peace, or persons in her Majesty's naval or military service, or in the coast guard service, or in the service of the revenue, or in the police or constabulary force, or special constables, or persons duly licensed to kill game, or persons to whom any license had been granted under the said Act, residing or being within the district included in the said proclamation, that is to say within the said county of the city of Dublin, on or before the 25th day of July, in the year of our Lord 1848, to deposit and leave at, &c., within the said district, or at the police station or barrack nearest to his, her or their residence, all and every gun or guns, pistol or pistols, or other fire-arm or fire-arms, and any part or parts of any gun, pistol or other fire-arms, and any sword or swords, cutlass or cutlasses, pike or pikes, bayonet or bayonets, and any bullets, gunpowder and ammunition which he, she or they may have in his, her or their custody, power or possession. And the jurors aforesaid upon their oath aforesaid do further say that after the said 25th day of July, in the year of our Lord 1848, in the said notice mentioned, and whilst the said proclamation was in force and not revoked, and whilst the said Act did apply to the said county of the city of Dublin, Samuel Otway, late of &c., in the said county of &c., being an evil-disposed person, on the &c., day of &c., in the — year of the reign of our said Sovereign Lady the now Queen, at &c., aforesaid, within the said county of &c., specified in the said proclamation and notice, unlawfully, knowingly and contrary to the provisions of the said Act, had in his custody, power and possession a certain pistol and a certain quantity of powder and leaden bullets, the said Samuel Otway then and there not being a Justice of the Peace, and not being a person in her Majesty's naval or military service, or in the coast guard service, or in the service of the revenue, or in the police or constabulary force, and not being a special constable, or a person duly licensed to kill game, and not being a person to whom a license was granted under the said Act and not revoked, against the peace of our said Lady the Queen, her Crown and dignity, and contrary to the form of the statute in such case made and provided.

"And the jurors aforesaid upon their oath aforesaid do further say and present that after the 20th day of December, which was in the year of our Lord 1847, to wit upon the 18th day of July, in the year of our Lord 1848, his Excellency the Lord Lieutenant of Ireland, by and with the advice of the Privy Council of Ireland, did

in pursuance and execution of an Act passed in the eleventh year of the reign of our Sovereign Lady the now Queen, intituled 'An Act for the better prevention of Crime and Outrage in certain parts of Ireland until the 1st day of December 1849, and to the end of the then next Session of Parliament,' at Dublin, in the county of the city of Dublin, declare by proclamation duly published in the Dublin Gazette and then and there duly posted, with an abstract of the provisions of the said Act at the foot according to the provisions of the said Act, that from and after the 20th day of July 1848, in the said proclamation mentioned, the said Act should apply to and be in force for the county of &c. And the jurors aforesaid upon their oath aforesaid do further say that after the said 20th day of July, in the year of our Lord 1848, in the said notice mentioned, and whilst the said proclamation was in force and not revoked, and whilst the said Act did apply to the said county of &c., the said S. O., on the said — day of — in the — year of the reign of our said Sovereign Lady the now Queen, at &c., aforesaid, within the said county of &c., specified in the said proclamation and notice, unlawfully, knowingly and contrary to the provisions of the said Act, did carry and have within the said county of &c., elsewhere than in his dwelling-house, to wit on the person of him the said S. O. aforesaid, in the said county of — aforesaid, a certain pistol, &c., the said S. O. then and there not being a Justice of the Peace, and not being a person in her Majesty's naval or military service, or in the coast guard service, or in the service of the revenue, or in the police or constabulary force, and not being a special constable, or a person duly licensed to kill game, and not being a person to whom a license was granted under the said Act, and not revoked, against the peace of our said Lady the Queen, her Crown and dignity, and contrary to the form of the statute in such case made and provided."

11 & 12 Vic. c. 2, s. 2, enacts, that whenever the Lord Lieutenant shall deem it necessary it shall be lawful for him to declare by proclamation, to be published in the Dublin Gazette, that from and after a certain day therein named this Act shall apply to any county, &c.

§ 11 & 12 Vic. c. 2, s. 2.—"And be it enacted, that printed copies of every proclamation issued under this Act shall be posted on or near to the doors of all places of public worship, and of every police station and barrack within the district named in such proclamation, and at the foot of every copy of any such first mentioned proclamation so posted as aforesaid an abstract of the provisions of this Act shall be printed for the information of all persons affected by the enactments herein contained."

|| Sec. 9 enacts, "That from and after the day named in any such first mentioned proclamation, and thenceforth during all the time for which any such proclamation shall be in force, it shall not be lawful for any person whomsoever (except Justices of the Peace, persons in her Majesty's naval or military service, or in the coast guard service, or in the service of the revenue, or in the police or constabulary force, or special constables, or persons duly licensed to kill game, or persons to whom any license shall have been granted under this Act, as herein-after secondly mentioned,) to carry or have, within the district specified in any such proclamation, elsewhere than in his or her own dwelling-house, any gun, pistol or other fire-arm, or any part or parts of any gun, pistol, or other fire-arm, or any sword, cutlass, pike or bayonet, or any bullets, gunpowder or ammunition; and every person carrying or having any gun, pistol or other fire-arm, or any part or parts of any gun, pistol or other fire-arm, or any sword, cutlass, pike or bayonet, or any bullets, gunpowder or ammunition, contrary to the provisions of this Act shall be guilty of a misdemeanour," &c.

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In re THE GUARDIANS OF THE NORTH
 DUBLIN UNION

v.

SAMUEL SCOTT.

June 7, 8.

(*Queen's Bench.*)

A house un-occupied or in the possession of a caretaker is not liable to be rated for relief of the poor under 1 & 2 Vic. c. 56.

Semble—
 Where an order for a *certiorari* had been obtained, and no cause shown against it, it is too late to raise a question of jurisdiction after a return had been made to the *certiorari*.

THIS case came before the Court on a return by the Recorder of Dublin to a writ of *certiorari*.

A rate had been made by the Guardians of the North Dublin Union on the city electoral division on the 29th of September 1849, which included nine houses in Richmond-street and Summer-hill Parade, of which Samuel Scott was the landlord. At the time of making the rate all these houses were untenanted. In four of them paid caretakers resided for the purposes of the protection of the houses, they possessing some necessary furniture, such as bedding, and the other five houses were unfurnished and locked up, the caretakers of the other houses holding the keys of those so locked up for the owner. Samuel Scott appealed from this rate to the Recorder, who decided that the houses were not rateable, and ordered the assessments to be struck out of the rate, and thereupon the Guardians applied for a *certiorari*, and a conditional order having been granted accordingly, and no cause shown against it, the *certiorari* was issued and a return made by the Recorder in accordance with the terms of the writ.

Mullen and Fitzgibbon, on behalf of the Guardians.

This appeal is brought under 1 & 2 Vic. c. 56, s. 106 (Poor Relief Act); and by the 109th section the grounds of appeal are required to be stated. The principal ground in this case is, that houses being unoccupied are not liable to be rated; the Recorder has decided they are exempt from rating, and in order to have that decision reviewed, the Guardians of the North Dublin Union have obtained this *certiorari*.

J. D. Fitzgerald (with him *R. H. Mills*), on behalf of Samuel Scott, objected that this Court had no jurisdiction, the Recorder's Court being the appellate jurisdiction, and the Recorder's decision final.

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The 6 & 7 Vic. c. 56, s. 106, gives the appeal to the Quarter Sessions where any person is aggrieved by any order or conviction of any Justice (except where such Justice shall be an Assistant-Barrister) or by any rate, or by any person being put in or left out of any rate, such appeal to be within four calendar months after the cause of complaint shall have arisen; or if any Session shall be held before the expiration of one calendar month next after such cause of complaint, then such appeal is to be made to the next following Sessions. Then the 107th section says, "That the Justices
 "and Assistant-Barrister, before whom any appeal shall be brought,
 "are hereby empowered to *hear and finally determine* the matter of
 "such appeal, and to make such order thereon as to them shall seem
 "meet, which order shall be final and conclusive upon all parties;
 "and in case of any appeal against any rate as aforesaid, to order
 "the name of any person interested or concerned in the event of
 "such appeal, and having had notice thereof as is herein provided,
 "to be inserted in such rate, and to be rated at such sum or sums of
 "money, or to order the name of any such person to be struck out
 "of such rate, or the sum or sums at which any such person is
 "rated therein, to be altered as the said Justices and Assistant-
 "Barrister shall think right, and such Justices and Assistant-
 "Barrister, or some proper officer of the Court, shall forthwith add
 "to or alter the rate accordingly." Then the 108th section provides that if on such appeal the rate be decreased, the amount paid is to be returned; and the 109th section requires the appellant to give fourteen days' notice in writing of the appeal to the clerk of the Guardians or the respondent or respondents, and provides that the Justices and Barristers shall not examine into any other cause of complaint than such as is specified in the notice of appeal; and the 111th section enacts, that within five days after notice of the appeal the appellant is to enter into a recognizance before a Justice of the Peace, with sufficient securities, conditioned to try such appeal at the

T. T. 1850. then next Sessions of the Peace, to be held in the presence of the
Queen's Bench Assistant-Barrister, and "to abide the order of and pay such costs
 GUARDIANS "as shall be awarded by the Justices and Assistant-Barrister at
 OF THE N. D. "such Sessions." Then the 114th section expressly provides against
 UNION the removal of any rate by *certiorari* into any Court but the Queen's
 v. Bench, which provision, as to the removal of the rate, is repealed
 SCOTT. by the subsequent statute 2 Vic. c. 1, s. 10, and that latter statute
 excludes the jurisdiction in this matter. A *certiorari* lies only
 to remove matter of record.

PERRIN, J.

This objection to the jurisdiction should have been made on an application for a rule to show cause against the *certiorari*.

CRAMPTON, J.

The return and the *certiorari* are now before the Court, and the objection cannot be entertained.

Mullen.

The 61st section of 1 & 2 Vic. c. 56, empowers the Guardians of every union, or where a Board of Guardians shall not be acting, the persons or officers appointed by the Commissioners in their behalf, to make and levy such rates as may be necessary on every *occupier* of rateable hereditaments in or arising within such union; and the 71st section enacts, "That every rate, &c., shall be paid to the "person authorised to collect the same by the person in the actual "occupation of the rateable property at the time of the rate made, "and on his default then by the person subsequently in the occu- "pation of the rateable property, from whom such rate shall be "demanded." The 63rd section defines rateable hereditaments, "all lands, buildings and opened mines, all commons and rights of "common, and all other profits to be had, received or taken out of "any land; all rights of fishery, all canals, navigations and rights "of navigation, and rights of way and other rights or easements "over land, and the tolls levied in respect of such rights and ease- "ments and all other tolls." The 64th section enacts that every

rate "shall be a poundage rate made upon an estimate of the net annual value of the several hereditaments rated thereunto," thus showing the mode of counting the value. It was argued before the Recorder that as by the 61st section the rate was to be made on the occupier, and by the 71st section payment was to be made by the person in the actual occupation, that if there be no occupier, there can be no rate; and the case of *The Undertakers of the Grand Canal Company v. The Guardians of the South Dublin Union* (a) was relied on; and thus the question arises, who is an occupier within the meaning of the Act? *Rex v. Thomas* (b); *Rex v. Ellis* (c); *Theobald on the Poor-laws*, p. 113; *Regina v. St. Mary Kalendar* (d); *The King v. St. Mary the Less* (e); *The King v. Inhabitants of Woodland* (f); *The Company of Ironmongers v. Nailer* (g).

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The intention of the Poor-law Act was that all property should be rated, occupied or unoccupied, and that is manifest from the 63rd section. It is said in *Vin. Ab. Occupier*, A, "Where there is no tenant the owner may be said to be occupier." The words "actual occupation" in the 71st section are relied on by the respondent; and *The King v. Inhabitants of St. Nicholas Rochester* (h) may be cited to show what actual occupation means; but Denman, C. J., expressly says that the meaning which "occupied" has received "in considering what occupation was necessary to constitute a "mansion-house in which burglary might be committed, or to give "a right of voting, or to make a party rateable to the relief of the "poor, is no test of its meaning" in that particular case; and Littledale, J., there put the case on the ground that the person who sublet could not maintain trespass. Scott did not sublet these premises, he therefore could maintain trespass. The occupation of a caretaker is the occupation of the owner. In the English Poor-law Acts there is no clause analogous to the 63rd section of the 1 & 2 Vic. c. 56; and the recital of the exemptions in that section,

(a) 6 Ir. Law Rep. 424.

(c) 1 M. & S. 652.

(e) 4 T. R. 477.

(g) 1 Ven. 311.

(b) 9 B. & C. 114.

(d) 9 Ad. & El. 628.

(f) 2 East, 164.

(h) 5 B. & Ad. 219.

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of buildings used for religious worship, the education of the poor and public purposes, shows that all others are liable to be rated.

R. H. Mills and J. D. Fitzgerald (Martley with them), contra.

There is no distinction to be made between the houses in which caretakers were resident and those in which the caretakers did not reside; in either case the house is unoccupied within the meaning of the Act. The Irish Act follows the English Act 43 *Eliz.*, adopting the exemptions from rating, which by several judicial decisions had from time to time been made in England. But this question has never been raised in England; for it has been the uniform practice there not to rate unoccupied houses.

In England rating is a personal charge; for the statute of 43 *Eliz.* provides the rating to be by taxation of every inhabitant, parson, vicar and other, and of every occupier of lands, houses, &c: *Case v. Stephens (a)*. The word "inhabitant" is not in the Irish statute: *The King v. St. Luke's (b)*; *Rex v. The Commissioners of Salterns' Load Sluice Navigation (c)*; *The King v. Waldo (d)*. That is a strong case, and was adopted by Denman, C. J., in *The Queen v. Wilson (e)*, in which he says, "it is a case which has been frequently recognised." The landlord of an untenanted house cannot be regarded as its "occupier" within the meaning of the Act. "Occupier" is used in different senses: *The King v. Inhabitants of St. Nicholas Rochester (f)*.

Here occupation signifies any description of personal use or enjoyment, and no matter how slight this use or enjoyment may be it will be sufficient to constitute the landlord an occupier: *The King v. St. Mary the Less (g)*; *The King v. The Inhabitants of Aberystwith (h)*.

In the Irish Act the rate is a personal charge in respect of the lands, not a charge upon the lands, &c. The Act uses the words "actual occupation," which entirely preclude the supposition that constructive occupation is sufficient.

(a) *Fitzg. Rep.* 297.

(c) 4 T. R. 730.

(e) 12 Ad. & El. 105.

(g) 4 T. R. 477.

(b) 2 Bur. 1053.

(d) Cal. Rep. 358.

(f) 5 B. & Ad. 226.

(h) 10 East, 354.

There is no machinery in the Irish Act enabling the Guardians to find out who the occupier is, and this difficulty was felt in the passing of 6 & 7 Vic. c. 92, making the immediate lessor liable for tenements of less than £4 value. If they were not known they were to be rated as "immediate lessor;" and it is the occupier alone who can be rated: 1 & 2 Vic. c. 56, s. 61; that is, the occupier of rateable hereditaments; with this section the 63rd section is to be read; and in section 124 occupier is defined to mean "every person "in the immediate use or enjoyment of any hereditaments rateable "under this Act, whether corporeal or incorporeal." How then can a person be rated for premises who derives no profit out of them? or how can he be said to be in the immediate use or enjoyment of them if he derive no profit out of them?

There is a power of distress given on the rateable property to enable the rate to be levied by the 78th section of the Act; that must be on the goods and chattels of the persons in occupation at the time of the making of the rate, or on his default on the subsequent occupier at the time of the demanding of the rate; and the schedule to the Act specifies the form of a rate, and it clearly shows the rating is a personal one.

An owner and an occupier are distinct things: *Rez v. Morgan (a)*. Is a landlord to be deemed an occupier because he has not a tenant? —[CRAMPTON, J. That is not the question; but whether these premises be at all rateable or not?—PERRIN, J. I think the construction of the 64th section a primary step in the case.]—The owner *quod* owner is not liable to the rate under 43 *Eliz.* c. 2.—[MOORE, J. The 106th section, which gives the appeal, contemplates a rate imposed on some person; if wrongly imposed, the person had a right to object to his name being on the rate.]—That shows that there must be at least a personal liability. The occupier or immediate lessor must be rated; but mere ownership will not saddle an obligation on the party.

Fitzgibbon, in reply.

The statute of 43 *Eliz.* is entirely distinguishable from the Irish

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(a) 2 Ad. & El. 618.

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Relief Act, and cases decided on it can have no immediate application here. There is in it not a word importing a tax on the property charged. The rate there was a charge on a person; in the Irish Act it is a charge on the land. Occupation does not necessarily mean a person actually being in a house, but it may mean keeping other persons out; it implies exclusive possession, and that the defendant enjoys. He has that right, and how can it be said he is not in the beneficial occupation of the premises when he is excluding others because they will not pay the rent he requires? *Rex v. The Justices of Buckinghamshire (a)*.—[CRAMPTON, J. The case must rest on the construction of the statute.—MOORE, J. The English authorities are useless unless so far as they affect the meaning of the word "actual."—BLACKBURNE, C. J. How does it appear that this is a rate on the premises and not on the defendant?—It appears on the face of that order of the Recorder that he changed the sums and made no change as to the name at all.—[MOORE, J. What is the meaning of "rate and levy" in the 61st section?—Nothing but that a rate is to be made and levied on the occupier.

BLACKBURNE, C. J.

The Court are of opinion that the Recorder has come to a right conclusion, and we must therefore affirm his judgment, with costs.

(a) 3 Nev. & Man. 68.

H. T. 1851.
Queen's Bench

DUHIG v. LEE.

Jan. 11.

SYMAN, on the part of the defendant, moved that the writ of summons in this cause and copy, and service thereof, be set aside, on the ground that the said writ and copy stated no form of action. By the writ of summons the defendant is called on to enter an appearance to an action on a promissory note. This is clearly irregular, for the plaintiff may on that declare either in debt or assumpsit.

A writ of summons issued requiring the defendant to enter an appearance to an action on a promissory note; *Held*, irregular, in not stating the form of action.

The schedule to the New Process Act sets out the form of summons to be used, which schedule is by the 50th section to be deemed and taken to be part of the Act; and in that schedule it is specified that the form of action the party intends to adopt ought to be stated in the summons: *King v. Sheffington (a)*. The writ there was to answer the plaintiff in an action of trespass on the case, and the declaration was in assumpsit, and the Court observe, "When you say 'trespass on the case,' you may mean one of two forms of action, and therefore do not specify the form of action with sufficient precision; the forms must be adhered to:" *Youlton v. Hall (b)*. In that case the cause of action was described as "an action on the case promises," and the writ was set aside for irregularity, Alderson, B., observing, "It is better in these cases to adhere to the strict rule."

Harris, contra.

There can be no prejudice to the defendant by this description of the cause of action in the writ; he is at once informed of the nature of the demand against him: *Davies v. Parker (c)*. The writ of summons there described the cause of action as one of "slander," and it was held sufficient. Patteson, J., stating that greater infor-

(a) 1 Dow. P. C. 686; S. C. 1 Cr. & M. 383.

(b) 7 Dowl. P. C. 186.

(c) 2 Dowl. P. C. 537.

H. T. 1851. *Queen's Bench* mation is given to the defendant by using the words "action of slander" than by using the words "action on the case."

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The cases on the English Act are not applicable; it differs from the Irish Act, as the schedule to the former requires the party to appear to an action on promises, thereby confining the plaintiff to that particular form of action.—[BLACKBURN, C. J. "Or as the case may be," those words must mean according to the truth.]

BLACKBURN, C. J.

We must decide according to the construction of the statute, that the form of the action must be set out in the writ of summons, and therefore we must set aside this writ as informal; but as we have a discretion as to costs, each party in this case must abide their own costs.

Motion granted.

M'NALLY v. KEARNEY.

Jan. 11.

A plea will be set aside if filed without the signature of Counsel.

MEAGHER, on behalf of the plaintiff, moved that the plea filed in this case be set aside, as it had not the signature of Counsel attached. By the New General Orders declarations in a particular form of action do not require the signature of Counsel; but nothing is said as to pleas.

Per Curiam.*—Take the order.

* *Coram* BLACKBURN, C. J., and MOORE, J.

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Queen's Bench

WATT v. COOPER.

Jan. 11.

O'REARDON moved, on behalf of the defendant, that the replication in this cause be set aside for irregularity, on the ground of its not being entitled of the day and year on which it was filed, as prescribed by the 43rd General Order.

A replication set aside for irregularity, it not being entitled as of the day and year of filing.

MOORE, J.

What mischief is induced by this omission? I will not give costs for correcting an irregularity of this description, where no injury is shown to have arisen in consequence thereof.

*Per Curiam.**

Set aside the replication. No costs.

* *Coram* BLACKBURN, C. J., and MOORE, J.

ANTHONY KIDD

v.

FLEMING RIDDLE, HUGH RIDDLE, and HENRY ORR.

Jan. 25.

JOHN MACARTNEY moved for liberty to issue a *scire facias* to revive a judgment, and that service might be substituted on one of the defendants, Fleming Riddle. He moved on the affidavit of the plaintiff, which stated that Fleming Riddle left this country in 1849 and went to America, where he still resided, leaving his wife and family in this country, residing on the lands of Armoney, where

When a defendant is resident in America, the Court deemed service on his wife resident in this country good service under the 171st General Order.

H. T. 1851. *Queen's Bench* he had resided before he went to America. That on the 30th of December the wife of Fleming Riddle informed defendant that he was still alive and had sent her money. Under these circumstances
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 RIDDLE. he submitted that he was entitled to have service substituted under 172nd General Order, which directs that the Court may on application direct such substitution of service as they may think fit. If we are compelled to proceed under the 171st Order, by serving the defendant personally, the plaintiff will lose his entire demand, which is only £33, and the costs of such service would exceed that sum.

PERRIN, J., entertaining a doubt as to his jurisdiction to make this order, directed the matter to be mentioned to the full Court; and *Macartney* subsequently renewed the application, whereupon the Court made the following order :—

Let the plaintiff be at liberty to issue a *scire facias* to revive the judgment in this cause against the defendants, serving defendants with copies of said writ of *scire facias*; and let service of said writ upon the wife of the said Fleming Riddle be deemed good service upon him.

SIMCOCKS v. DUFF.

Jan. 24.

When a declaration had been filed, varying from the common form prescribed by the New General Orders, the Court will not make an order deeming it good; but will allow the plaintiff to take it off the file, paying any costs incurred by the defendant.

JOHN MACARTNEY moved that the declaration filed in this case do stand good, notwithstanding that it varied in a slight particular from the prescribed form. The declaration is on a bill of exchange; the drawer had signed the bill by initials, and the declaration contained a special averment to that effect; but no order of the Court was obtained giving liberty to vary from the form as settled by the Judges.

MOORE, J.*

I will give you liberty to take the declaration off the file, paying the defendant any costs he may have incurred ; but I do not think the Court has jurisdiction to make the order sought.

H. T. 1851.

Queen's Bench

SIMCOCKS

v.

DUFF.

* *Solus.*

Lessee GREER v. THE EJECTOR.

J. C. LOWRY, on behalf of the plaintiff, moved for liberty to mark judgment in this case, a copy of the defence not having been delivered at the time of taking the defence, contrary to the 54th General Order.

Jan. 29.

A defence in ejectment will be set aside when a copy is not served with notice of the defence.

CRAMPTON, J.

You cannot mark judgment with a defence on the file. I will give you a conditional rule to set aside the defence as not being conformable with the Order.

H. T. 1851.
Queen's Bench

MAGRATH v. M'INTYRE.

Jan. 27.

The Court will allow a declaration to be filed varying from the form prescribed by the General Orders.

HAMILTON SMYTHE moved for liberty to file a declaration varying from the form prescribed by the Judges.

This was an action on a bill of exchange, and the drawer was described in the bill by the name of "Thomas H. Wilkins." We seek to insert an averment to the effect that the drawer is therein described as "Thomas H." his name being Thomas Henry.

CRAMPTON, J.—Take the order.*

* Similar orders have been made by PERRIN, J., and MOORE, J., the former observing, when a like application was moved for, that it was "for permission to draw a declaration according to law."

STAUNTON v. BROWNING.

Jan. 27.

Service of a summons will not be substituted on the attorney of a defendant, unless the attorney be engaged for him in a suit actually pending.

O'DRISCOLL moved for liberty to substitute service of the writ of summons in this case on the defendants by serving David Mahony, who was alleged to be their attorney. The affidavit stated that the defendants resided in London, and that Mahony had acted as their attorney in two causes, and that the present action was connected with, and originated out of, those causes.—[CRAMPTON, J. Is it sworn that Mahony is now their attorney, or are these causes still pending?—The causes are at an end.

CRAMPTON, J.

I have consulted with my Brother MOORE, and we are of opinion

we cannot grant this application. A suit must be actually pending in which the attorney is acting to authorise the granting such application.

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Queen's Bench
 STAUNTON
 v.
 BROWNING.

No rule.

THE PRINCIPAL OFFICERS OF HER MAJESTY'S
 ORDNANCE

v.

REARDON.

Jan. 28.

J. B. MURPHY moved, on behalf of the defendant, for liberty to lodge in Court to the credit of this cause the sum of £4. 10s. in full of the plaintiffs' demand, the defendant undertaking to pay the plaintiffs' costs up to the time of lodgment, when taxed and ascertained, or in default thereof the plaintiff to be at liberty to mark judgment, and issue execution for the amount of such taxed costs.

A party will not be allowed to lodge money after plea pleaded and notice of trial served.

W. H. Griffith, contra.

This was an action of assumpsit for money paid to the use of the defendant, and issue has been joined and notice of trial served. This application comes too late after notice of trial served, and the defendant has made no affidavit of merits. One portion of the ground of action is clear, and the other doubtful, and this is an attempt to try this doubtful question at the peril of costs: *Hodges v. Lord Litchfield* (a). In that case, in assumpsit for breach of an agreement to sell an estate, the Court refused to allow the defendant to select certain of several allegations of damage contained in a single count, and pay money into Court on those particular allegations: *Burman v. Shepperd* (b); *Pawlett v. Heatfield* (c).

(a) 9 Bing. 713.

(b) 12 Mod. 90.

(c) *Ibid*, 95.

H. T. 1851.
Queen's Bench

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BLACKBURNE, C. J.

This application is too late after notice of trial served. It is not fair to a plaintiff to ask him to decide what course he would pursue just as the trial is about to take place.

Refuse the motion, with costs.

LORD STRADBROOKE v. BROWN.

Jan. 30.

The 255th
New General
Order applies
to cases where
there is but
one plaintiff
in ejectment as
well as several.

HARRIS moved on behalf of the plaintiff for liberty to file a declaration in ejectment varying from the form prescribed by the New General Orders. The 255th Order says :—"The forms of declarations in ejectment in the fourth schedule to these Orders shall be "the forms of declarations to be used in all actions of ejectment."

That form does not provide for the case of one plaintiff, but for the case of several, and the present case is that of one plaintiff, and it has been suggested that there is a necessity for an application to the Court in such a case. Such an order was made in the Court of Exchequer.

CRAMPTON, J.

Such a construction of the Order is not the correct one. There must have been some peculiarity in the case in the Court of Exchequer. I shall make

No rule.

H. T. 1850.
Crim. Appeal.

THE QUEEN v. WILLIAM MURPHY.*

(*Court of Criminal Appeal.*)

Feb. 15.

THE prisoner William Murphy had been indicted, tried and convicted of embezzlement at a Commission of Oyer and Terminer for the County of the City of Dublin in December 1849.

The first count of the indictment charged that he, on the 17th of December, in the twelfth year of the Queen, being *employed as clerk* to the Reverend Theobald Mathew and others, did receive into his possession a sum of money, to wit £29. 15s. 8d. of their money, and did fraudulently and feloniously embezzle and steal the same, against the peace and statute, &c.

The second count stated that the prisoner was the clerk of Theobald Mathew, Thomas Hughes and Patrick Brophy; but in other respects was similar to the first.

It appeared upon the evidence that the prisoner was the *Secretary* and Treasurer of a Friendly Society called "The Princess Royal National Total Abstinence Tontine Society," and that he had, whilst acting in such capacities, received the subscriptions payable by the different members of the society, and that there was a balance in his hands of such subscriptions, over and above all disbursements thereout, amounting to the sum of £29. 15s. 8d. up to and for the

An indictment charged that A, being employed as clerk to T. M. and others, did receive into his possession a certain sum of money and did embezzle the same. The evidence in support of this indictment was, that the prisoner was the Secretary and Treasurer of a Friendly Society, and that the property charged to have been embezzled was vested in certain members as trustees. That on the October quarter-day the prisoner accounted and returned a balance in his hands; that on

the Christmas succeeding the next quarter-day it was the practice of the society to distribute the surplus remaining in the hands of the prisoner, but that shortly before that time he absconded with these funds without having brought forward his intermediate receipts between September and December, and that he was styled Treasurer and Secretary indiscriminately.

Held, that the prisoner being employed to receive this money, and having undertaken the duty, he thereby virtually became clerk to the society, and responsible to it as such.

Semle—That secretary and clerk must be considered synonymous terms within the meaning of 10 G. 4, c. 56 (the Friendly Societies' Act).

Held also, his having accounted with the trustees did not alter or vary his position as clerk, or place him in the situation of trustee.

Held also, the prisoner having passed his account, and a balance being struck in September, and in the December following, and not having given credit for the intermediate receipts, but absconded, that this was sufficient evidence to go to the jury of an intention to embezzle.

* BLACKBURN, C. J., CRAMPTON, J., PERRIN, J., RICHARDS, B., LEFROY, B., BALL, J., and MOORE, J., presiding.

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17th of September 1848. That Patrick Murphy, a member of the society, *the Reverend Theobald Mathew, Thomas Hughes and Patrick Brophy* (in whom the property was laid in the indictment), were the *President and Stewards* of the society at the time when the offence was committed by the prisoner. The certified rules of the society were produced and proved, and by the 23rd rule the *President and Stewards for the time being were declared to be "the Trustees of the Society, and that all moneys, goods, chattels, "effects and property whatever belonging to the society should be "vested in them as such trustees for the use and benefit of the "society and the respective members thereof, and such trustees "should, when properly authorised by the society, bring or defend "any action, suit or prosecution concerning any property, right or "claim of this society."* The rules also named the Reverend Theobald Mathew President of the society.

It further appeared that the members of the society were in the habit of meeting on certain quarterly days for the purpose of auditing and settling the accounts of each quarter, and that the 17th of September 1848 was one of those quarterly days of meeting, and the 17th of December 1848, another quarterly day of meeting; but the 17th of December 1848 having fallen on a Sunday, the meeting took place on the 18th of that month. That it was the course and practice of the society, if any surplus or balance of the funds remained in the hands of the Treasurer and Secretary, that such surplus was distributable before Christmas in each year, and that it was the duty of the prisoner to have such surplus or balance, if any, ready to be paid over *when required so to do*. It further appeared that *two books were kept by the prisoner*, one of which books was called on the trial the *day-book* and the other the *ledger*, and that *all subscriptions paid in by the members to the prisoner at the different weekly evening meetings of the society were entered by him at the time of the payment thereof in his day-book*, and that those several payments, as well as the disbursements by him there-out were afterwards, at the *end of each quarter, transferred to the ledger*, and a balance struck on foot of such account, showing the clear balance in the hands of the prisoner at the termination of

each quarter; and that the before-mentioned sum of £29. 15s. 8d. was the clear balance in his hands at the end of the quarter ending the 17th of September 1848. *It appeared, however, that with reference to the quarter ending the 17th of December 1848, the prisoner had not brought forward his intermediate receipts between the 17th of September and 17th of December into the ledger, though they amounted, as appeared by his day-book, to £12. 8s. 2d., and though he did bring forward his disbursements for the same period, which amount to the sum of £9. 5s. 6d.*

It further appeared that very shortly after the meeting of the society, on the 18th of December 1848, preparatory to the distribution of the surplus funds of the society amongst its members, *that prisoner left his house and residence in the city of Dublin, and disappeared altogether with the funds of the society, and that he could no where be found, and that he remained concealed until about the end of October 1849, when he was arrested, and the present indictment afterwards preferred against him. It appeared by the two account books produced on the trial, which were all in the handwriting of the prisoner, that he took credit for different sums against the moneys that came to his hands as payments to himself as Secretary to the society, and which could only be understood as payments to him as a remuneration for his trouble as an officer of the society, and no distinction appeared to have been taken in the books of the society, or in the general rules of the society, or upon the evidence adduced on the trial between the office of the Secretary and Treasurer—in fact, the title “Treasurer” did not appear in any of those documents, nor in the prisoner’s accounts; though the title “Secretary” was mentioned frequently in all those documents, and in the general rules of the society. The prisoner himself was one of the members of the society.*

The case for the Crown having closed, the Counsel for the prisoner called upon the Court to direct a verdict of acquittal upon the following grounds:—First, because the prisoner had fairly accounted with the society, and had not denied the receipt of the money, and that his offence at most amounted to nothing more than

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 MURPHY. a breach of trust, but not to embezzlement. Secondly, because the prisoner being himself a member of the society, he could not be convicted of embezzlement of the money mentioned in the indictment, the same or some part thereof being the property of the prisoner himself. Thirdly, because the prisoner had received the money as Treasurer, for which employment it did not appear in evidence that the prisoner had received any payment or remuneration.

The jury found the prisoner guilty, and the Court postponed passing sentence, reserving these points for the consideration of this Court.

Cruise, with him *J. A. Curran*, for the prisoner.

The prisoner, on the evidence in this case, cannot be held guilty of embezzlement. His duty as Secretary of the society was to enter the subscriptions, and keep a day-book and ledger; and by his account in September 1848, he admitted a credit in his hands, and having accounted fairly, if he be chargeable with any offence, it can only amount to a breach of trust. Further, it was proved that he was more generally called Secretary than Treasurer, for which office he received no pay; therefore the relation of servant to the society did not exist. These two offices are quite distinct. Previous to the passing of his quarterly accounts all the money received by him was received *quâ* Secretary; but when the accounts were audited and settled, he then became possessed of the money no longer as clerk to the society, but as their Treasurer; and a trust was placed in him to keep it until distribution; the possession was constructively changed: *Beasley's case* (a).—[BLACKBURN, C. J. I do not see that the case supplies you with any facts showing that there was any change in his character either constructively or actually; it was his duty to keep this money for the society. Every thing would appear to have been done by him in the same capacity.]—Previous to the passing of his account, at Common Law he could not be convicted of larceny for this money; but he could after, for then the character of his possession was constructively changed:

(a) 2 East, P. C. 1010.

Regina v. Creed (a); *Rex v. Hodgson* (b); *Regina v. Norman* (c); *Rex v. Murray* (d).—[PERRIN, J. The only difference between an indictment for larceny and embezzlement is, that the money taken in the one case came actually into the possession of the prisoner; in the other constructively.]—The statute shows that one charge will not support the other: *Rex v. Grove* (e).—[CRAMPTON, J. It was his duty to have the money ready to pay over when he was required so to do. It was never contemplated that the money should come to his hands in any other capacity than for the purpose of distribution.]—*The Queen v. Waite* (f); *Regina v. Norval* (g); *Rex v. Willis* (h).

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Baldwin, for the Crown (*Smyly* having waived his right to begin), contended that the third point is exactly the converse of the argument relied on by the prisoner's Counsel.—[LEFROY, B. If the points be untechnically put, but on the facts there appear sufficient to decide on, we will not be controlled by the informality.]—The argument is, that he received the money as clerk, yet the moment it came into his possession *ipso facto* he became trustee; but there is nothing to show any change took place in the prisoner's situation. The only difference is as to the amount; before audit that was unknown; but when the accounts were audited the exact amount in his hands was known; but the society would have the same right to call for the money in his hands before he had accounted as after.—[RICHARDS, B. His office was a combination of both situations; but he appears to me as much Treasurer before he had accounted as after.]—*Regina v. Welch* (i) shows that although there be no given time for accounting, yet the party is bound to do so in a reasonable time, otherwise he would be guilty of embezzlement: *Regina v. Jackson* (k). The crime here consists in not accounting and paying over the balance. He should have rendered an account on the

(a) 1 Car. & Kir. 63.
(c) Car. & M. 501.
(e) 1 Mood. C. C. 447.
(g) 1 Cox, 95.
(i) 1 Den. C. C. 199.

(b) 3 C. & P. 422.
(d) 1 Mood. C. C. 276.
(f) 2 Cox, 245.
(h) 1 Mood. 375.
(k) 1 Car. & Kir. 384.

H. T. 1850. 18th of December; and account means account and pay; if he
Crim. Appeal. does not do this he does not account: *Rex v. Williams (a)*.

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As to the second point. There are several authorities to show
 that when property is vested in trustees, it is embezzlement in a
 member of the society to withhold it: *Regina v. Cain (b)*; *Regina*
v. Miller (c); *Rex v. Hall (d)*.

LEFROY, B.

My difficulty arises on the rules (which are to be taken as part
 of the case), that is, whether this person, who is stated in the rules
 to be both Secretary and Treasurer, whether he stood in the capacity
 of clerk or servant of the society? Admitting the property was in
 the trustees, the question is, was he their servant to collect this
 money and keep it safe? If doing this constitute him a servant
 within the meaning of the Act, I cannot see any difference between
 this case and that of an agent or receiver; but looking to *Rex v.*
Burton (e), I doubt very much whether as clerk or servant he
 comes within the meaning of the Act. It is quite plain from the
 rules that the trustees had no power to dismiss him; he is
 therefore not in the relation of clerk or servant over whom they
 had control, and he puts himself in that relation subject to certain
 fines for neglect of duty. Is that such a relation in which we can
 by implication bring him within the meaning of this statute,
 whereby his breach of duty is made penal? Here the prisoner was
 not appointed by those who are said to be his masters; they did not
 appoint him and cannot dismiss him; it therefore raises a consider-
 able doubt in my mind as to whether this party, so stated to be
 Secretary and Treasurer, and contracting that he would be liable to
 certain fines for breach of his duty, comes within the meaning of
 the terms "clerk and servant."

Baldwin.—Rex v. Jenson (f).

(a) 7 C. & P. 338.

(c) 2 Mood. C. C. 249.

(e) 1 Mood. C. C. 237.

(b) 2 Mood. C. C. 204.

(d) 1 Mood. C. C. 474.

(f) 1 Mood. C. C. 434.

PERRIN, J.

By the 10 G. 4, c. 56, s. 33, the statute relating to Friendly Societies, he is called secretary or clerk.

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LEFROY, B.

That appears to be a legislative definition of clerk, and relieves my difficulty.

Curran, for the prisoner.

Unless the Court overrule *Creed's case*, they must decide in favour of the prisoner. *The Queen v. Tucker (a)* shows that the fact of the prisoner absconding is not sufficient to support the charge of embezzlement.—[BLACKBURN, C. J. In *Creed's case* the Master forbore to ask payment until next day. Suppose he had said, "Pay me this time twelve-months," that would be a new contract. Here there is a state of things in which there is no new contract—no new dealing.—CRAMPTON, J. This is a question of *animus*. Suppose the jury think the defendant never intended to pay over this money, but that he appropriated it to his own use, that would be embezzlement. If there be evidence to lead to that conclusion, we are precluded by the case; and yet you call on us to imply that he did not intend to apply it to his own use.]-If he had that intention from the commencement, that might be so; but if he acts fairly at first, and afterwards misappropriates the money, then it is but a breach of trust; unless there be a *suggestio falsi*, there is no embezzlement.

As to the second point. The first count lays the property in Theobald Mathew and others, and the prisoner may be one of those others. The Act speaks of a Treasurer or trustee; although he was clerk, it was no portion of his duty to receive this money as clerk; it was a voluntary act his receiving it.—[CRAMPTON, J. If he received the money under the authority of the trustees for the society, he is clerk *pro hac vice*.]-There is nothing to create the relation of master and servant.

(a) 1 Cox, C. C. 235.

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Smyly, for the Crown, was not called on.

BLACKBURNE, C. J.

In this case the prisoner was indicted, for that he on the 17th of December, twelfth year of the Queen, being employed as clerk to the Rev. Theobald Mathew and others, did receive into his possession a sum of money, to wit, £29. 15s. 8d. of their money, and did fraudulently and feloniously embezzle and steal the same. The second count stated that the prisoner was the clerk of Theobald Mathew, Thomas Hughes and Pat. Brophy, but in other respects was the same as the first. This indictment correctly lays the money to have been the property of those three persons, who were the trustees of the funds of this society; and it is quite plain that the prisoner had not any legal right or interest in it so as to sustain the objection; that in this respect he was not liable for the embezzlement of it.

Three questions have been raised in this case. The first is, whether the prisoner was clerk to this society? The second, if he was clerk, had he ceased to be such at the time the embezzlement was committed? and the third, whether there was evidence to go to the jury of the prisoner's intention to embezzle the sum of £29. 15s. 8d?

Upon the first question the material inquiry is not whether he was Secretary or Treasurer of this society at the time this offence was committed; but whether he in fact was the clerk of the society when he received the money and embezzled it? That he was employed to receive the money, and did receive it, is quite clear. So it is also clear from the statement, that according to the course and practice of the society, if any surplus or balance remained in his hands, it was distributable before Christmas in each year, and that it was the duty of the prisoner to have it ready to be paid over when required so to do. Having undertaken this office and this duty, he cannot now be allowed to say he was not clerk to this society, or to escape from the responsibility which he voluntarily incurred.

But, secondly, it has been argued, that though he may have been clerk or servant within the meaning of the Act, when he

received the money, he ceased to fill that capacity from the time he had accounted on the 17th September; and that from thenceforward he stood in the new relation and character of a trustee. There is no pretence for that argument. His character and duties were the same from the beginning to the end—nothing occurred to change or vary them. The collection of the money and the care of it was confided to him in one capacity—in one only—and nothing occurred to vary or affect it; therefore, these first two objections are utterly untenable.

Creed's case has been relied on as establishing the proposition, that if a party once fairly accounts for money, he cannot afterwards be made liable on an indictment for embezzling it. Whatever may be thought of that case as an authority in such an abstract and general position, the case in its facts, and as an authority, is quite distinguishable from the present one, because the prosecutor there assented to the proposition made to him, allowed the prisoner to take the time he required, and assented to the delay of payment. Here was, therefore, a distinct dealing with, and confidence reposed in him, which may justly be deemed to have varied the capacity and character in which he had been originally employed.

As to the question whether there was evidence to go to the jury of an intention to embezzle, see what are the facts. The prisoner passed his account, and a balance was struck on the 17th of September, and on the 18th of December the prisoner should have stated his account and brought forward that balance, giving credit for it and for his intermediate receipts; but instead of doing so, he absconds. Is not that evidence to go to the jury of an intention to embezzle? The time at which he conceived that intention no person can tell; but it is enough to say that at some time or other—whether when he showed the balance in September, or when he should have accounted on the 18th of December, or when he absconded, is quite immaterial, there was evidence abundantly sufficient to justify the inference, that he intended to embezzle the money. These objections therefore cannot prevail, and there must be

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Judgment for the Crown.

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BLACKBURN, C. J.

I will certify that the case reserved has been heard by the Court, and each objection overruled, and on this certificate being produced to the Judge at the Commission Court, the proper judgment will be pronounced.



T. T. 1850.
June 13.

THE QUEEN v. MARGARET BYRNE.*

In a case where a prisoner pleaded guilty to an indictment for larceny, which set forth a previous conviction for felony, and the Judge, feeling doubts as to his power to pass sentence of transportation, reserved the question for the consideration of this Court without sentencing the prisoner:—
Held, that the Court of Criminal Appeal had no jurisdiction to entertain such a case.

Seemle—
Where a writ of error could be brought this Court has no jurisdiction.

In this case the prisoner pleaded guilty before BALL, J., at the last Assizes of the county of Wexford, to an indictment for larceny, which set forth a previous conviction for felony.

By the 9 *G. 4*, c. 54, s. 21, it is enacted, that if any person shall be convicted of any felony not punishable with death, committed after a previous conviction for felony, such person shall be liable to be transported for any term not less than seven years, or to be imprisoned for any term not exceeding four years.

By the 9 *G. 4*, c. 55, s. 3, it was enacted, that any person convicted of simple larceny, or of any felony thereby made punishable like simple larceny, should, except in the cases thereafter otherwise provided for, be liable to be transported for seven years, or to be imprisoned for any term not exceeding two years.

By the 12 *Vic. c. 11*, s. 1, the foregoing enactment of the 9 *G. 4*, c. 55, s. 3, is repealed so far as relates to the transportation of any such offender; and it is enacted, that every such offender so convicted shall be liable to be otherwise punished as by the said Act of the 9 *G. 4*, c. 55, is provided.

By the 3rd section of the foregoing Act (12 *Vic. c. 11*) it is enacted, that where any person has been twice convicted of any of the offences punishable upon summary conviction, under certain Acts therein mentioned, if the person so twice convicted shall after—

* *PIGOT, C. B., CRAMPTON, J., PERRIN, J., BALL, J., JACKSON, J., MOORE, J.*, presiding.

wards commit simple larceny, or any offence by the said Act of the 9 G. 4, c. 55, made punishable like simple larceny, such offender being convicted thereof, shall be liable to be punished as if the said Act of the 12 Vic. c. 11, had not been passed.

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On the part of the Crown it was submitted that it was competent for the Judge to pass a sentence of transportation upon the prisoner (who had been several times previously convicted of other offences), notwithstanding the 12 Vic. c. 11, the 21st section of the 9 G. 4, c. 54, being still in force, and unaffected by the last mentioned statute.

The question for the consideration of the Court was, whether it was competent for the Judge to pronounce a sentence of transportation under the foregoing circumstances?

The *Attorney-General* (Monahan) and *Baldwin* appeared for the Crown.

This case is not one that can be reserved under the statute for this Court; the only question is, what sentence should be passed on the prisoner? For by the 21st section of 9 G. 4 that sentence is discretionary with the Judge; here no sentence was passed. The prisoner pleaded guilty on a charge of larceny, the indictment for which offence charged that she had been before convicted of felony.—[MOORE, J. Can this Court pronounce a sentence of transportation?—We say nothing can be reserved for the Court of Criminal Appeal that may be made subject-matter of writ of error, and that the points to be reserved for this Court are those that arise on the trial.—[BALL, J. There are no words in the statute restricting the reservation to cases where a writ of error would lie; on the contrary the words are as general as possible.]—Before the passing of the statute, if a prisoner were convicted for one offence, he having been previously convicted of another offence, the plea of not guilty put all these matters in issue; then 6 & 7 W. 4, c. 111, was passed, providing that a prisoner's conviction was not to be given or read to the jury until after the finding of a subsequent felony.—[CRAMPTON, J. The case comes before us under Lord Campbell's Act, and I do not think it is at all within it.—MOORE, J.

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Under that 6 & 7 *W.* 4, c. 111, it would be necessary to take the opinion of the jury on both questions if there were a plea of not guilty, viz., whether or not the prisoner was guilty of larceny, and whether or not there was a conviction for the previous offence?—
 FIGOT, C. B. The Act of Parliament (11 & 12 *Vic.* c. 78) seems to contemplate the prevention of a writ of error.]—The statute was intended to provide for cases in which a writ of error would not lie.

The 1st section of the 11 & 12 *Vic.* c. 78, empowers the Judge to reserve any question of law which shall have arisen on the trial, and the Court is to have power to respite the judgment or postpone it until the question reserved shall be decided. The 2nd section enables the Court to order an entry on the record, that in the judgment of the Court the party ought not to be convicted, or to arrest the judgment, or to order judgment to be given thereon. But in the present case the Judge pronounced no judgment, and how can this Court direct judgment to be given?—[PERRIN, J. The question in effect is to order a particular judgment to be given, and there is no appeal from that; whereas if the Judge pronounced a wrong sentence, error would lie.]—[CRAMPTON, J. Is the indictment maintainable? It says, "being so convicted of felony aforesaid;" and the statute 12 *Vic.* c. 11, applies only to summary convictions.—[BALL, J. Has the 9 *G.* 4 been repealed by that subsequent statute?—In the 9 *G.* 4, c. 54, there is a general enacting clause, and 9 *G.* 4, c. 55, received the royal assent on the same day.—[FIGOT, C. B. The 12 *Vic.* c. 11, in terms recites 9 *G.* 4, c. 55, and enacts, that for the offences specified the punishment shall not be transportation; it does not enact that simple larceny shall be punishable by transportation. Then the question is, whether, before 12 *Vic.*, that offence was so punishable by the previous statute?]

No Counsel appeared on behalf of the prisoner.

FIGOT, C. B., delivered judgment.

We are of opinion this Court has not jurisdiction in the present case. The 11 & 12 *Vic.* c. 87, has already been the subject-matter of

discussion in *Regina v. Faiderman and others* (a); and as I understand the view of the Court in that case, it amounts to this:—That although there is power given to arrest the judgment, yet there is no power given by the statute to review a judgment on demurrer where a party can pursue his remedy by writ of error. In England also questions have arisen as to whether the Court will hear objections to matter that appears on the record; and in two cases the Court of Criminal Appeal have exercised jurisdiction where objections to the indictment appeared upon the record: *Regina v. Webb* (b); *Regina v. John Martin* (c). The present case is differently circumstanced. Under the 11 & 12 Vic. c. 78, the Judge is empowered to reserve “any question of law which shall have arisen “on the trial for the consideration of the Justices of either Bench “and Barons of the Exchequer, and thereupon shall have authority “to respite execution of the judgment upon such conviction, or “postpone the judgment until such question shall have been considered and decided.” Now did the question mooted here arise upon the trial? Certainly not. Was there in fact what is technically called a trial? Every thing was done without objection; the prisoner pleaded guilty, but no sentence was pronounced; nothing remained to be done but the pronouncing that sentence, which is undisclosed in the mind of the Judge, and no question arose at the trial. Had that sentence been pronounced, it might have been the subject of error. We therefore do not think we have jurisdiction.

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BALL, J.

But one observation. I think we ought to give this statute a liberal construction—not a strict one. This case was peculiarly circumstanced. There was not in strictness what is called a trial. The prisoner pleaded guilty, and until issue be joined, the trial does not commence. I therefore agree in thinking the Court has not jurisdiction in such a case.

No rule, for want of jurisdiction.

(a) 14 Jur. 377.

(b) 2 Car. & Kir. 933.

(c) Ibid, 950.

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The *Attorney-General* intimated to the Court that instructions would be given to the Clerks of the Crown and Peace to frame indictments against persons previously convicted of larceny, so as to enable the Judge to award a sentence of transportation if he shall think fit.

NOTE.—The indictment was in this form :—

County of Wexford, } “The jurors for our Lady the Queen upon their oath do
to wit. } say and present that heretofore, to wit at a General Assizes
and General Gaol Delivery, held at Wexford, in and for the said county of Wexford, on the 2nd day of March, in the ninth year of the reign of our Sovereign Lady Victoria, Margaret Byrne was then and there convicted of felony, and which said conviction is still in full force, strength and effect, and not in the least reversed, annulled or made void : And the jurors aforesaid, upon their oath aforesaid, do further present that Margaret Byrne, late of Doonamore, in the county of Wexford aforesaid, dealer, being so convicted of felony as aforesaid, afterwards, to wit on the 4th day of January, in the thirteenth year of the reign of our Sovereign Lady Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, and soforth, with force and arms, that is to say, with swords, sticks and soforth, at Doonamore aforesaid, in the county Wexford aforesaid, two shirts, each of the value of one shilling, of the goods and chattels of one Patrick Kelly, then and there being found, did then and there feloniously steal, take and carry away, against the peace of our said Lady the Queen, her Crown and dignity, and contrary to the form of the statute in that case made and provided : And the jurors aforesaid, upon their oath aforesaid, do further say and present that the said Margaret Byrne being so convicted of felony as aforesaid, afterwards, to wit on the said 4th day of January, in the year last aforesaid, with force and arms, at Doonamore aforesaid, in the county of Wexford aforesaid, two shirts, each of the value of one shilling, of the goods and chattels of the said Patrick Kelly, then lately before feloniously stolen, taken and carried away, feloniously did receive and have, she the said Margaret Byrne then and there well knowing the said goods and chattels to have been feloniously stolen, taken and carried away, against the peace of our said Lady the Queen, her Crown and dignity, and contrary to the form of the statute in that case made and provided.”

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Lessee O'CALLAGHAN v. O'CALLAGHAN.

(*Queen's Bench.*)

Nov. 6.

In this case a rule nisi had been obtained, to set aside the nonsuit had in this cause on the ground of irregularity. This was an ejectment on the title, and the plaintiff not having proceeded within the ordinary time prescribed by the rule of Court, the defendant obtained a conditional order on the 10th of June for liberty to enter up judgment as in case of a nonsuit. Notwithstanding the pendency of this order, the plaintiff served notice of trial for the last Summer Assizes for the county of Cork, and the defendant not appearing, the plaintiff was nonsuited for not confessing lease, entry and ouster.

Joshua Clarke, for the plaintiff, showed cause.

There has been no irregularity in our proceeding to trial. A conditional rule cannot stay proceedings, unless it be part of the rule that it shall do so. If it be so, then the other party goes on at his peril; and if the conditional rule be set aside, so will proceedings founded on it.—[BLACKBURN, C. J. Is the order capable of suspending the proceedings until it be finally disposed of?] No: *Jones v. Hovs (a)*—[BLACKBURN, C. J. But the facts there constitute a difference between the cases.]—We went to trial notwithstanding the order, having had sufficient excuse for not going to trial at the previous Assizes.

Where a conditional order was obtained for liberty to enter up judgment as in case of a nonsuit, and pending that order the plaintiff served notice of trial and brought down the cause:—*Held*, that this conditional order had not the effect of suspending the proceedings, and that the plaintiff was not irregular in taking down the case for trial.

Seemle.—Assuming that it had the effect of suspending the proceedings, the laches of the defendant would prevent his taking advantage of it.

Sir *C. O'Loghlen*, contra.

The whole of these proceedings were irregular, for they served

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O'CALLAGHAN notice of trial pending a notice to enter a nonsuit; this they should not have done until the conditional rule for the nonsuit was disposed of. A peremptory undertaking to go to trial according to the practice of this Court would not have been cause against this rule, and by moving in the matter before the order was made absolute, the proceedings are rendered irregular. We did not appear at the trial, and are now entitled to judgment of nonsuit, unless they show good cause.

BLACKBURNE, C. J.

The defendant was entitled to move the motion for judgment as in case of nonsuit at any period of Easter Term. This he did not do until the 10th of June, when he sought to do so, and thereby disable the plaintiff from proceeding to trial. We do not think the conditional order has the effect of suspending the proceedings; but as the defendant was misled in supposing the proceedings were suspended by the conditional order, and no trial was had on the merits, we will set aside the nonsuit on payment of the costs of the trial by the defendant.

Verdict set aside, with costs. No costs of motion.

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ROBERT HOEY

v.

MARK COFFEY, Executor of MARY TIMMONS.

Nov. 8.

COVENANT against defendant as executor of Mary Timmons.— The declaration stated an indenture of the 30th of October 1837, whereby the plaintiff demised to Mary Timmons certain premises for a term of thirty-one years, from the 1st of May 1837, at the yearly rent of £140, payable the 1st of May and 1st of November. *Breach*—the non-payment of one year's rent due and ending the 1st of November 1849, which had accrued due after the decease of Mary Timmons, and whilst the defendant was executor.

To this declaration defendant pleaded as to so much of the rent as was alleged to have accrued due on 1st November 1849, *Actionem non*—Because he saith that Mary Timmons, on the 21st of July 1838, assigned the premises (out of which the rent accrued) to Thomas Duff for the residue of the term contained in the indenture of the 30th of October 1837, subject to the payment of the rent; and that Duff afterwards, in the lifetime of Mary Timmons, entered and became possessed of said premises for the residue of said term. That whilst he continued so possessed, and after the death of Mary Timmons, and after the 1st of November 1849, to wit on the 1st of January 1850, one Thomas Smyth, who defendant averred had a lawful right of entry into said lands by title paramount to the right and title which the plaintiff had therein at the time of the making of the said demise, by the procurement and direction of the plaintiff, commenced an action of ejectment on the

To an action of covenant brought by lessor against executor of lessee for a year's rent, due 1st of November 1849, the defendant pleaded that the testator had assigned the premises to A in 1838 for the residue of the term; that A thereupon entered and became possessed, and whilst in possession was evicted by title paramount, on an ejectment brought by B, in March 1850, by the procurement of the plaintiff; in which the fictitious demises were stated to have been made on the 1st of November 1849. *Virtute cuius*, A became a trespasser by relation as against the

feigned lessee and the lessors of the plaintiff in ejectment in regard of the possession of the lands, as from a time before the rent became due.

Held, that the plea was bad on demurrer in not showing an eviction by title paramount before the rent became due.

Held also, that the plea stating the demises to have been laid on the 1st of November, the Court were not bound to infer that they commenced on the first hour of that day, and therefore the plea failed to establish title on that day.

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title to recover possession of said demised lands, and that the declaration in such ejectment stated the demises therein to have been made on 1st November 1849. That by like procurement of the plaintiff, the declaration in said ejectment was duly served on the day and hour aforesaid, to wit, on the 1st day of November 1849, and further proceedings taken, and judgment was marked by default against the casual ejector in Hilary Term 1850, and an *habere* was issued in the name of the feigned lessee upon this judgment on the 4th day of March 1850, and duly executed, &c. *Virtute cujus*, the said Thomas Duff was then made a trespasser by relation as against the feigned lessee, and the lessors of the plaintiff in the declaration in ejectment in regard of the possession of said lands as from a time before the rent became due.—*Verification*.

Special demurrer to this plea, assigning as cause that it did not confess or traverse the substantial matter in the breach of covenant. That the plaintiff could not have taken any certain issue in respect of said assignment. That the defendant had not shown any matter of fact in accordance of the covenant, and that the issue tendered in respect of the ejectment proceedings was insensible and immaterial.

Denis Caulfield Heron, in support of the demurrer.

The plea is bad on general demurrer. No actual eviction is shown prior to the accruing of the rent. On the contrary the *habere* was not executed until the 1st of March 1850. The defence raised by the plea is a question of the computation of time; and it is laid down in *Catesby's case* (a) that "where the computation is doubtful, it is good to determine it for the relief and remedy of him who hath right." The declaration states the lease to have been made to the testator to hold from the 1st day of May 1837. The Court may therefore decide that the six months of the term covered by the plea began to run on the 1st of May, and so ended on the 31st of October; or may adopt the other rule of construction and exclude the 1st of May from the term. But if the Court so adopt the latter rule of construction, they must also adopt it with regard to the fic-

(a) 6 Rep. 61, b.

titious lease, and hold that the fictitious lease did not commence in possession until the 2nd of November. The day of the date of an instrument or of the commencement of a term may either be excluded or included according to the circumstances, and the decision should be on the principle *ut res magis valeat quam pereat*.

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In *Thomas v. Popham* (a) the day of the date, was held to be exclusive. In *Hatter v. Ashe* (b) inclusive of the term. Some early cases decided that "from the date" should always mean exclusive of the day of the date; but Lord Mansfield, in *Pugh v. The Duke of Leeds* (c), says of these:—"The authorities of *Co. Lit.*, p. 46, b, *Bacon v. Waller* (d), and *Lewellyn v. Williams*, were at that time grumbled at as being against the sense of mankind, against conscience and against justice, and founded upon subtleties that even the schoolmen would have been ashamed of;" and he says:—"From' may, in the vulgar sense, and even in the strictest propriety of language, mean either inclusive or exclusive" (e). There is no inflexible rule for the computation of time: *Lester v. Garland* (f); *Anonymous* (g). But though the six months did not expire until the 1st of November, and even if the fictitious lease were made on the same day, still, if justice require it, the law will take notice of the fractions of a day: *Thomas v. Desanges* (h); 3 *Cruise Dig.* tit. *Rents*, c. 1, s. 59; *Stafford v. Wentworth* (i). There tenant for life with remainder over made leases for years, reserving rent payable at Lady Day and Michaelmas, and died on Michaelmas at twelve o'clock of noon; and the question was whether the rents belonged to the executor or the remainderman? or whether the tenants should retain them? Lord Macclesfield decided that they belonged to the executor, because, though for the benefit of the tenants, they had until the last instant of the day to pay their rents, yet the reservation being on Michaelmas Day, they were at their peril to take care that they were paid accordingly.

(a) Dyer, 218, b.

(c) Cowp. 720.

(e) Cowp. 725.

(g) 1 Ld. Ray. 480.

(b) 1 Ld. Ray. 84.

(d) 3 Buls. 204.

(f) 15 Ves. 248.

(h) 2 B. & Al. 586.

(i) 1 P. Wms. 180.

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In trespass for the mesne rates the judgment in ejectment would be conclusive evidence as to the title of the lessor for all the mesne rates accruing subsequently to the date of the demise: *Adams on Ejectment*, 4th ed. p. 171; not for the rates accruing on the day of the demise. The fiction of title by relation cannot destroy the landlord's right to his rent. The Court may hold the fictitious lease to have been made on the last moment of the 1st of November. In *Roe d. Wrangham v. Hersey* (a) it was held, *per totam Curiam*, "If my ancestor die at five o'clock in the morning, "I enter at six, and make a lease at seven, it is a good lease. It is "said there is no fraction of a day, but this is a fiction in law, "*fictio juris neminem ledere debet*, though aid much it may, and "this is seen in all matters where the law operates by relation, and "division of an instant, which are fictions in law." Again in *Co. Lit.* p. 150 a, it is said:—"A relation or fiction in law shall never "work a wrong or charge to a third person, but *in fitione juris* "*semper equitas consistet*;" *Butler and Baker's case* (b); *Menville's case* (c). There it was resolved "*relatio est fictio juris*, to do a "thing which was and had essence to be annulled, *ab initio*, betwixt "the same parties to advance a right, or *ut res magis valeat quam* "*pereat*; but the law will never make such a construction to "advance a wrong which the law abhorreth, or to defeat collateral "acts, which are lawful, and principally if they concern strangers;" *Vin. Ab. tit. "Relation,"* c. 3, p. 4; tit. "*Fiction,*" A. 4, 5, 7.

Molesworth and Napier, contra.

A judgment in ejectment has reference to the demise in the declaration so as to make the defendant a trespasser by relation: *Nugent v. Phillips* (d). At the time this rent became due had the plaintiff disaffirmed the instrument? or was there a disclaimer? *Duppa v. Mayo* (e); *Gilbert on Rents*, p. 146. "So if a disseisor "makes a lease for years rendering rent, and afterwards the disseissee "enters and ousts the lessee, yet the lessee shall be accountable for

(a) 3 Wils. 271.

(b) 3 Rep. 29, b.

(c) 13 Rep. 21.

(d) 8 Ir. Law Rep. 17.

(e) 1 Wms. Saund. 277.

"the rent incurred before the ouster, because the lessee cannot be taken for a trespasser, since he came into the land under the sanction of a legal contract; though the disseisor, having but a defeasible title, could not perform the contract; however, until it was destroyed, and while the lessee had the peaceable enjoyment of the land, that obligation to pay the rent, which was founded upon the enjoyment, must continue, and consequently the lessee be obliged to pay the rent until the entry of the disseisee: *Roll. Abr.* p. 429, *d*; *Franklin v. Carter* (*a*). The fictitious demise has relation to some portion of a day: *Jack d. Lynas v. Hampton* (*b*). There a notice was given to quit on the 1st of November if the tenancy originally commenced on that day, or if not, then at the end of half a year from service of the notice. The demise in the ejectment, founded on the notice, was laid on the 1st of November, and it was held that it was laid a day too soon: *Achland v. Luttley* (*c*). "For if a man seised in fee makes a lease for years, rendering rent at the Feast of St. John the Baptist, upon condition of re-entry for non-payment of rent, now the lessor, if he will take advantage of the condition, must demand it at sunset. Yet if he dies after sunset and before midnight, his heir shall have this rent, and not his executors, which proves that the rent is not due until the last minute of the natural day:" 1 *Wms. Saund.* 286, *b*; *Ryalls v. Bramall* (*d*); *Jones v. Carter* (*e*).

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J. D. Fitzgerald, in reply, was stopped by the Court.

BLACKBURN, C. J.

This was an action of covenant brought against the executor of a lessee for one year's rent, due the 1st of November 1849, and the defence relied on is an eviction by title paramount previous to the accrual of the last gale.

(*a*) 3 Dowl. & L. 213; S. C. 1. M. & Gr. 750.

(*b*) 2 J. & Sy. 448.

(*c*) 9 A. & E. 839; S. C. 1 Per. 1 Dav. 636.

(*d*) 1 Exch. 734.

(*e*) 15 Mees. & Wels. 718.

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It is immaterial to inquire whether the rent became due on the first or last hour of the day; for the plea does not show (what is material to such a defence) a title paramount and an eviction thereunder before the rent became due; in point of fact there was no eviction until the 5th of March 1850. The defendant however avers that there was an eviction by virtue of an ejectment, the demises in which were laid so far back as to overreach the period when the rent became due, and therefore had the effect of making him a trespasser by relation from that time. This, perhaps, might raise a question of some difficulty if the fact were so; but the construction contended for cannot be put on this plea, because it does not show that there was any such title created or existing on the 1st of November 1849.

The plea is very curious so far as regards this matter; for there is an averment that after the 1st of November 1849, the parties having title paramount brought an action of ejectment on the title, and that the declaration in the action of ejectment stated the demises to have been made on the 1st of November 1849. We are not bound to say that the operation of these leases was that they should commence on the first hour of the first day of November. It is quite consistent with the statement in this plea that these leases were to commence from and after the 1st of November, and therefore the plea fails to establish the existence of title on that day. It is not stated at what time the demise was to commence; but the plea avers that the declaration was served on the day and year last aforesaid; and are we to infer in favour of this plea (of the merits of which I say nothing) that the demises commenced on the first hour of that day? The plea should be certain in every particular, and as it fails on the very point on which it ought to be precise, the demurrer must be allowed.

CRAMPTON, J.

I am also of opinion that this plea is bad. It is admitted that the rent was due on the day named, the 1st of November 1849, and the defence is a plea of an eviction by title paramount. Now that eviction did not take place until March 1850; but then it is said

that we are to annul the covenant in the actual lease, owing to the relation caused by the fictitious lease in the ejectment. If this defence were good, it would equally hold good in a case in which the relation reached back five years.

These transactions, whatever may be their effect between the parties bringing the ejectment and the person in possession, cannot affect the right of the landlord.

PERRIN, J., and MOORE, J., concurred.

Demurrer allowed.

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JOHN M'DONNELL v. ROBERT KENNETH and others.

Nov. 15.

ACTION on the case, tried before Ball J., at the Antrim Summer Assizes of 1850.

The declaration was in the ordinary form, containing but one count by the reversioner in fee for injury done to his estate.

Plea—Not guilty.

At the trial it appeared that the lands, the injury to which was complained of, were held under the Antrim family since 1637, and that the root of the title of both plaintiff and defendants was a fee-farm grant of the 27th of July 1637, made between the then Earl of Antrim and his brother of the one part, and Alexander Magee and Donnell Magee of the other part, in which grant was this exception:—"Excepting all mills, mill-sites and ponds, and excepting all mines of brass, lead, iron, coal and other mines and minerals, and excepting all quarries of slate and freestone, together with free

A fee-farm grant of 1637 excepted to the grantor, his heirs, &c., all mines and minerals, with liberty to dig and take away the same. The representative of the grantor erected houses, made tram-roads and formed other works on the lands for the purpose of working a mine, which works were found by the jury necessary and proper for that purpose. Held, that

under the statute 10 G. 1, c. 5, such works were justifiable; and independently of that statute that under the grant the defendants were authorised in using all modern modes of working the mine, and were not confined to such as were in use at the time of the fee-farm grant.

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"liberty to dig and take away the said mines and minerals, and slate
"and freestone, and also excepting all salmon fishing, and likewise
"excepting all manner of hawk and other game and royalties what-
"ever arising, growing or being in or upon the premises or any part
"or parcel thereof," &c. The plaintiff derived under the grantee
and the defendants represented the grantors in that fee-farm grant,
and were entitled to all the rights reserved by that exception;
they had formed a company for the purpose of working a colliery
in the district, and had built a row of houses for the workmen
on the land, two of which were occupied as dwelling-houses, and
they had erected a pier on a rock running out to the sea,
attached to the land, for the shipping of coals. They had also
made tram-roads on the land to convey the coals to the pier, and
sunk shafts to bring up the coals; and the question at the trial was,
had the defendants the right to use the land in this way under that
exception? They had compensated the occupying tenant. There
was no dispute on the evidence, and from it it appeared that the
plaintiff's lands were deteriorated to an extent of at least three acres
by the defendants' works. The defendants, however, contended that
they were justified in all they did by the reservation in the grant
and by the statute 10 G. 1, c. 5, "An Act for the Further En-
"couragement of Finding and Working Mines and Minerals within
"the Kingdom of Ireland;" and that the houses erected and
all the other works done were necessary and proper for the purpose
of working the mines. The learned Judge directed the jury that if
they were of opinion the works done were necessary for working
the mines, and that the houses erected were convenient and neces-
sary for that purpose, and that no act was done on the land
not necessary for working the mines, then they should find for
the defendants; and if, on the other hand, they thought the works
or any of them were not necessary for working the mines, or that
any of the houses were not convenient for that purpose, then as to
such to find for the plaintiff, and assess damages according to the
diminution of value the land may have sustained by the excess; and
that if in point of fact the reversioner's estate had not been injured,
the plaintiff would not be entitled to a verdict.

The defendants' Counsel then submitted that as two of the houses built on the land were dwelling-houses, the Judge should tell the jury that the erection of such houses was not warranted by the statute 10 G. 1, c. 5, the exception in the fee-farm grant or otherwise; that the construction of tramways and the erection of the pier were not warranted; that there being an entire exclusion of the plaintiff and his tenants from the lands was not warranted; and that the Judge should not have left the question to the Jury whether the defendants had done any act not necessary for the working of the mines; but should have told the jury that the acts done by the defendants were injurious to the reversion. This direction was refused by the Judge, but to prevent a second trial he required the jury to consider what damages, if any, the plaintiff was entitled to, supposing the defendants were not justified in making the works, and supposing they were injurious to the reversion; if not injurious, then to find for the defendants; and if they found both things for the plaintiff, then to consider the amount of damages the plaintiff was entitled to. The jury found for the defendants on the main issue, assuming that the defendants had no right to erect the works, and being of opinion that the reversion was injured by them, they found for the plaintiff—damages, £14.

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A rule *nisi* having been obtained to set aside the verdict so had for the defendants, cause was shown by—

Tombe and Napier (with them *A. Vance*).

The defendants are the grantees of mines, and are protected by 10 G. 1, c. 5, s. 4. After reciting that many proprietors of lands in this kingdom, for the improvement thereof, and for encouraging improving tenants, have set their lands in fee-farm, and for lease for lives renewable for ever, or for a long term for years, with an exception of mines and minerals in such fee-farms or leases, that statute enacts, "That all and every person and persons to whom the
 "rent upon such fee-farms, or the immediate reversion in fee-simple
 "or fee-tail expectant on such lease or leases, do or shall belong, shall
 "have full power and authority to open, dig and work all mines or
 "minerals which shall or may be had or found in or upon the said

M. T. 1850. "lands, and to raise and carry away the ore thereof, or to demise the
Queen's Bench "same for thirty-one years as aforesaid; and that all and every the
 M'DONNELL "persons aforesaid, and all and every person and persons to whom
 v. "the said mines and minerals shall be demised as aforesaid, shall
 KENNETH. "and may have full liberty to build all such houses as shall be
 "found convenient and useful for working the said mines, and to
 "dig and make turf for the use of the said houses, where the same
 "shall happen to be in bogs or mountains only."

The defendants erected five houses, and they have been found by the jury convenient and useful for working the mines. The reservation of mines in a grant of this description is equivalent to a grant of the mines, and incident to that is the liberty to dig and carry away the ore and minerals. That liberty is not to be measured by the mode in which it was used at the time of making the grant, but is to be enjoyed with all modern improvements: *Bainbridge on Mines*, p. 323; *Senhouse v. Christian* (a); *Dand v. Kingscote* (b); *Bishop v. North* (c).—[BLACKBURN, C. J. Do any of these cases entitle you to occupy the ground?—No; that is given by the statute. The question was properly left to the jury, were the works of the defendants necessary and proper for the purpose of raising and carrying away the coal? Tram-roads were formed, and the jury have found these and all the other works of the defendant necessary.

The subsequent statute 15 G. 2, c. 10, extends the provisions of 10 G. 1, c. 5.

Fitzgibbon and Whiteside (with them *W. C. Dobbs*), contra.

The defendants erected a pier on our land, and that they had no right to do.—[BLACKBURN, C. J. But the utility of it is found by the jury as necessary for shifting the coals.]—Then they erected dwelling-houses, and how can they be said to be necessary in the sense of the statute? the houses there contemplated are for the purposes of the mines, for smelting and weighing. Here it was in evidence they cut up our soil; they formed tram-roads over the land;

(a) 1 T. R. 560.

(b) 6 Mees. & Wels. 174.

(c) 11 Mees. & Wels. 424.

they erected a pier actually on the land, and they built dwelling-houses, some occupied by carpenters and smiths, and one by their own superintendant of the works. The fee-farm grant does not enable the grantee to carry the coals by either land or water; and yet having thus rendered our ground valueless for any purpose by their works, a jury awards but £14 for the injury to our reversion.

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BLACKBURN, C. J.

This is an action of trespass brought by a reversioner for an injury done to his reversion, and the jury have found according to the facts in evidence that he had no right to maintain it. The direction of the Judge was in the very words of the statute 10 G. 1, c. 5, that if the houses built by the defendants were convenient and useful for working the mines, they should find for the defendants, leaving the case in the strongest terms for the plaintiff. The jury having found the houses in question convenient and useful, brings the case within the statute, and the finding that the other acts done were necessary for the purpose contemplated, brings that part of the case within the terms of the Common Law, nay, within the exception in the fee-farm grant itself. The cause shown must be allowed, with costs.

NOTE.—It was not pressed in the argument, that a railroad or a tram-road is something more than an easement; that it is the very occupation of the soil, and is an entire exclusion of others from the possession of the ground than the persons actually using the rail or tram-roads.

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LAMPHIER v. GIBBINGS.

Nov. 16.

Where a *ca. sa.*, on which the defendant had been arrested, was issued by a plaintiff, a judgment creditor, and at the time of the arrest the defendant had been declared an insolvent debtor, the Court discharged him from custody, it not appearing that this arrest had been sanctioned by the assignee of the insolvent, on the terms of the defendant not bringing an action.

F. MEAGHER, on behalf of the defendant, moved that he might be discharged from the custody of the Marshal of the Four Courts Marshalsea, on the ground of his being illegally arrested. A *capias ad satisfaciendum* had issued, directed to the Sheriff of the city of Dublin, grounded on a judgment obtained by the plaintiff against the defendant, under which he was arrested by the Sheriff. Subsequently to the obtaining of the judgment, and at the time of issuing of the writ of *capias*, the plaintiff had on his own petition been declared an insolvent debtor, and a vesting order had been pronounced thereon, but no official assignee was appointed.

The 3 & 4 *Vic. c. 107* (Insolvent Debtors' Act) provides, that on the filing of such petition the Insolvent Court is to order all the estate and effects of the insolvent to be vested in the provisional assignee. So that all the plaintiff's right and title to this judgment is now divested out of him, and he could not issue execution thereon.

Edward Sullivan, contra.

The Court will not discharge the defendant because his arrest was a proceeding for the benefit of the creditors of the plaintiff; and the cases decided in Bankruptcy furnish an analogy to the present: *Waugh v. Austen* (a). In that case the plaintiff, having become a bankrupt between interlocutory and final judgment, sued out execution in his own name, and the defendant was thereunder arrested, and on motion, similar to the one now before the Court, the application was refused.—[MOORE, J. In that case the proceedings were taken with the sanction of the assignee; here the assignee was no party to the proceeding.]—*Plummer v. Lea* (b); *Guinness v. Carroll* (c); 2 *Saund.* p. 72. The Court

(a) 3 T. R. 437.

(b) 5 Mod. 88.

(c) 1 B. & Ad. 464.

will regard the execution of the writ as if executed in the name of the bankrupt by the provisional assignee, especially as the provisional assignee, if he had wished, might have sued out and executed the writ in the bankrupt's name without issuing a *scire facias*. At all events, if the Court grant the application, they will rule the defendant to bring in and lodge in Court the amount marked on the writ as a preliminary to his discharge.

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F. Meagher replied.

*Per Curiam.**

The assignee did not sanction these proceedings. We will therefore discharge the defendant from custody, he undertaking not to bring an action.

* BLACKBURN, C. J., and MOORE, J.

THE QUEEN,

At the prosecution of RICHARD DUNNE,

v.

THE IRISH SOUTH EASTERN RAILWAY COMPANY.

Nov. 5, 8, 22.

MANDAMUS.—The writ recited the several Acts of Parliament constituting and incorporating the Irish South Eastern Railway Company, and that the Lands Clauses Consolidation Act (1845) and the Railways Clauses Consolidation Act (1845) were incorpo-

A, being tenant for life of certain lands held under a lease for lives renewable, was served with a notice to treat

by a Railway Company, and thereupon a memorandum of agreement, signed and sealed by A, but not by the Company, was entered into, by which the Company agreed to pay £1250 to A, and that a jury should be summoned at the instance of the Company to find a verdict for that amount. The Company entered into possession of the lands, and executed certain of their works, but neither summoned the jury, nor paid the money.

Held, that in such a case a mandamus would be granted to summon a jury, and that it was no valid return to such mandamus to say that such agreement was binding on the Company, and that it could be enforced in equity, they having acted on it.

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rated therewith, and set out sections 7, 9, 18, 21, 23 and 39 of the Lands Clauses Consolidation Act.

It then stated that Richard Dunne was seised for his life of a freehold lease for lives renewable for ever in certain premises in the parish and county of Carlow, numbered in the map and book of reference of the Railway, and had been in the actual receipt of the rents and profits thereof until the Company entered into possession of the same; that the Company, by a notice to treat, of the 21st of January 1847, served on the prosecutor, offered to purchase his interest in the premises, and to pay compensation for damages by reason of the execution of the works of the Railway, and required a statement in writing, within twenty-one days, of his estate in the lands, or in default, that they would proceed as provided in the Lands Clauses Consolidation Act (1845); that no agreement was come to within the twenty-one days; but that the prosecutor, before the 11th of November 1847, furnished the particulars of his claim, and that thereupon, by a certain memorandum of the 11th of November 1847, purporting to be a memorandum of agreement signed by Dunne, but not executed by the Company, the Company purported to agree to purchase the prosecutor's interest for £1250; and the prosecutor agreed that any jury to be summoned under the Act might find a verdict for £800 for purchase of the prosecutor's interest in the land, and £450 for severance and damage; that on the execution of the agreement by Dunne, the Company took possession of the premises and executed a part of their works and a portion of the Railway, and that they were still in possession, but that they did not perform their agreement or pay or tender the £1250, or lodge it in Court or vest it in trustees, or lodge same in the Bank of Ireland; that the said sums had not been ascertained by arbitration or valuation, and that the prosecutor, on the 27th of December 1847, and the 22nd of January 1850, had by notice required the Company to issue their warrant to the Sheriff of Carlow to summon a jury to assess compensation to the prosecutor, but that the Company had refused so to do, although a reasonable time for that purpose had elapsed; that the Company had refused to perform the agreement of the 11th of November 1847, alleging

it could not be enforced, and that the prosecutor was without any other legal remedy. The mandate of the writ required the Company, after due notice to the prosecutor, to issue a warrant under their common seal to the Sheriff of Carlow to empanel a jury pursuant to the Lands Clauses Consolidation Act (1845), to assess and determine by verdict the sum of money to be paid by them to the prosecutor for recompense and compensation for the value of his interest in the premises, and the permanent damage occasioned by the works of the Company, or show cause, &c.

The return set out the memorandum of agreement of the 11th of November 1847, made and entered into between the I. S. E. Company and Dunne, whereby the Company did for themselves and their successors agree with Richard Dunne, his heirs, executors, administrators and assigns, to purchase all and every his estate, right, title and interest; that is to say, the interest of the tenant or lessee under and by virtue of an indenture of lease bearing date the 30th of July 1805, in the memorandum of agreement in the writ mentioned, for the lives therein mentioned, with covenant for perpetual renewal thereof, of, in and to all those several pieces or portions of land, &c., at or for the price or sum of £1250 sterling; and that in consideration of the said agreement Dunne agreed to sell the lands to the Company for £1250, and to receive payment thereof as full satisfaction, and that the Company might be permitted forthwith to take possession, provided that the taking of such possession was not to be deemed an acceptance of Dunne's title, or a waiver of the right to investigate the same, and that Dunne should within seven days produce a satisfactory title to the lands, and that on payment of the £1250, or on a lodgment of the same in Court, or vested in trustees, Dunne should sufficiently grant and assign the premises to the Company; and the return proceeded—
 “In witness whereof the said Company are thereby stated to have
 “affixed their common seal, and the said Richard Dunne did there-
 “unto subscribe his name and did affix his seal, the day and
 “year,” &c.

The return then alleged that an indorsement was made on the agreement relating to the summoning of a jury, and how the

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purchase money was to be assessed, and that the verdict was to be signed by the Sheriff; it denied the allegation in the writ that the agreement could not be enforced, but that by reason of its being enforceable they had not issued their warrant to summon a jury, and it admitted that the agreement had been acted on.

Demurrer and joinder.

M. O'Donnell, with him *Brewster*, for the demurrer.

This return is bad, because it does not deny that Dunne, being tenant for life, was under a disability, and that therefore the purchase money should be ascertained in the modes specified in the Lands Clauses Consolidation Act, nor does it traverse the averment that the agreement of the 11th of November 1847 was made; and that since it was made the Company have been in possession. No allegation of the writ is denied, and the return admitting this agreement of the 11th of November 1847 to be in full force does not deny that the Company have not issued a warrant to summon a jury, nor does it show how the purchase money can be recovered or that the prosecutor was bound to adopt any other legal remedy. This memorandum of agreement could not be enforced in a Court of Law except by mandamus, for it is not under the seal of the Company nor signed by them: *The Queen v. Bristol and Exeter Railway Company* (a). In that case, because an agreement was not under the common seal of the Company, it was held it could not be enforced by action. The return states this agreement is in full force, yet it appears not to be executed by the Company, how then can it be acted on? The 7th section of the Lands Clauses Consolidation Act (1845) enables persons under disability to sell and convey, and the 9th section provides that the purchase money or compensation to be paid for any lands to be purchased, or taken from any party under any disability or incapacity, and not having power to sell or convey such lands except under the provisions of that or the special Act, shall not, except where the same shall have been determined by the verdict of a jury, or by arbitration or by the valuation of a surveyor appointed by two Justices under the Act, be less than shall

(a) 3 Rail. Cas. 777.

be determined by the valuation of two able practical surveyors, &c., and all such purchase money or compensation is to be deposited in the Bank for the benefit of those interested. The prosecutor could not bind the persons in remainder after him except under the Lands Clauses Act; and unless the requisites pointed out by the respective sections be complied with, how could this agreement be enforced in equity?

The Court called on the other side.

R. Longfield and Martley, contra.

A bill for specific performance could be maintained on the state of facts set out here, for the Company have obtained possession of the lands. The Company cannot deny the agreement is binding on them, and therefore they admit it by their return.—[BLACKBURN, C. J. Then it was their duty to empanel a jury, and they have not done so.]—The agreement is binding on them without the intervention of a jury, because under that 9th section the purchase money might have been determined by arbitration or by competent surveyors. In *The Fishmongers' Company v. Robertson (a)*, it was held, that if it appear a party has received the benefit of the consideration for which he bargained, it is no defence to an action of *assumpsit*, brought by the Corporation, that the contract was not under their common seal, and could not have been enforced against them: *London and Birmingham Railway Company v. Winter (b)*.

Brewster replied.

This agreement is void both at law and in equity. It is not under the seal of the Company, and is therefore void. True, there has been a part performance which a Court of Equity might notice, but a Court of Law cannot; and the Court will not refuse a *mandamus*, because a Court of Equity would enforce the contract. No action at law could be brought on the contract, because it is for the purchase of land; and to be binding, it must be signed by the party chargeable. A Corporation may seal, but they cannot sign, and they cannot take lands except authorised by statute. 8 & 9 *Vic.*

(a) 5 *Man. & Gr.* 131; 8 *S. C.* 6 *Scott N. R.* 56, 105.

(b) 1 *Cr. & Phil.* 57.

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c. 16, s. 97 (Companies' Clauses Consolidation Act 1845), provides,
 "With respect to any contract which, if made by private persons,
 "would be by law required to be in writing and under seal, such
 "committee or the directors may make such contract on behalf of the
 "Company in writing and under the common seal of the Company,
 "and in the same manner may vary or discharge the same;" and
 again, "such committee or the directors may make such contract on
 "behalf of the Company in writing signed by such committee or
 "any two of them, or any two of the directors," &c. Neither of
 these modes has been adopted here, and the seal of the Corporation
 not being affixed to the contract, it cannot be enforced: *Carter v.*
The Dean and Chapter of Ely (a); *The Mayor of Ludlow v.*
Charlton (b); *Arnold v. the Mayor of Poole* (c); *Regina v. The*
Mayor of Stamford (d); *Paine v. The Strand Union* (e). Dunne's
 interest is said to be for the term of his natural life in an estate for
 three lives renewable for ever; it is not then derivable out of the
 fee; and the 7th section of the Lands Clauses Consolidation Act
 only deals with interests carved out of the fee. It says:—"The
 "power so to sell and convey or release as aforesaid may lawfully be
 "exercised by all such parties *other than* married women entitled to
 "dower, or *lessees for life, or for lives and years, or for years, or*
 "any less interest," &c. Dunne being tenant for life, a jury can
 alone determine the compensation to which he is entitled. His
 case is not within the 7th section.

BLACKBURN, C. J.

The Court think the return insufficient; the demurrer therefore
 must be allowed.

Demurrer allowed, with costs.

(a) 7 Sim. 211.

(b) 6 Mees. & Wels. 815.

(c) 4 Man. & Gr. 860.

(d) 6 Q. B. 433.

(e) 8 Q. B. 328.

NOTE.—The question that was incidentally raised in the above case, as to the
 7th section of the Lands Clauses Consolidation Act (1845), has been the subject
 of decision in the Court of Exchequer, E. T. 1850, in *Legg v. The Belfast and*
Ballymena Railway Company. An ejectment on the title was brought by the

owner in fee of certain lands in the county of the town of Carrickfergus against the Belfast and Ballymena Railway Company and the tenant of the lands, to whom the owner had leased them for thirty years, with a strict clause against alienation or sub-letting. The tenant assigned a few perches to the Company to enable them to carry pipes for the supply of water to their reservoir, and the Company had paid the tenant the compensation he demanded. They had no dealing with the owner, but he required compensation also, and the Company, only requiring a temporary occupation of the land, declined to give him any, and he thereupon brought his ejectment for the forfeiture. At the trial it was insisted on behalf of the Company that there was no forfeiture of the tenant's interest, the Lands Clauses Act making the assignment a compulsory one; and the 6th, 7th, 12th and 15th sections of the Lands Clauses Act were relied on, but the learned Judge before whom the case was tried (CHAMPTON, J.) directed a verdict for the plaintiff, reserving the question for the Court above. On the argument the 7 G. 4, c. 29, and 2 W. 4, c. 17 (the Sub-letting Acts), were relied on by the plaintiff's Counsel (*Joy, O'Hagan, and C. A. W. Stewart*), and they pressed their argument on the 7th section of the Lands Clauses Act to the extent that a Company could not deal with a terminable interest, but were bound to purchase the fee. The defendant's Counsel (*Gilmore, Whiteside, Napier and Faloan*) relied on the 16th section of the Railways Clauses Act in connexion with the Lands Clauses Consolidation Act, contending, as below, that the assignment was compulsory, and that the Company were empowered to do all necessary acts for using the Railway, and that requiring the ten perches but for a limited period, they were not bound to deal for the fee. The Court of Exchequer (Pennefather, B., Richards, B., and Lefroy, B.), however, were of opinion that the Company were bound, and that they could not deal with the tenant without regard to the estate of the owner.

The 108th, 111th and 112th sections of the Lands Clauses Consolidation Act were not referred to in the argument; they appear to contemplate the case of a Company dealing with a terminable interest; for they provide for the Company purchasing or redeeming the interest of a mortgagee of lands, and that "whether they shall have previously purchased the equity of redemption of such lands or not," &c. It is extremely difficult to put a sensible construction on the 7th section so as to make it conformable with the intention of the framers of the Act.

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EDWARD HORNSBY,

Secretary to the Commissioners of Public Works,

v.

WILLIAM LAUNCELOT SLACK.

(Exchequer.)

Nov. 7.

Bond of pay-
clerk to Com-
missioners of
Public Works,
conditioned
(*inter alia*)
from time to
time when so
required, to
account in
writing for all
moneys, &c.;
and also make
good answer
for and pay
the moneys
due on the ba-
lance of such
account to the
said Commis-
sioners, &c.

In an action
on the bond,
replication
stated as a
breach, that
although de-
fendant had
accounted, and
a large sum
was due on
balance of such
account, yet
the defendant
did not make
good answer
for or pay the
balance, &c.

Rejoinder—
that defendant
paid part of said balance and make good answer for the residue thus, that he was
necessarily travelling on the public way in discharge of his duty, with such residue
on his person, when the same was violently and feloniously stolen and taken from
him, &c.

Held, on general demurrer, that the acts of strangers to the bond could not dis-
charge the obligor.

THIS was an action of debt on a bond. The declaration stated that
“the said defendant heretofore, to wit on, &c., by his certain writing
“obligatory, sealed with his seal, and now shown to the Barons of
“her Majesty’s Exchequer here, the date whereof is the day and
“year last aforesaid, acknowledged himself to be held and firmly
“bound to the plaintiff, so being Secretary of the Commissioners of
“Public Works as aforesaid, in the said sum of £400, to be paid to
“the said plaintiff as such Secretary as aforesaid, in trust for the
“said Commissioners of Public Works in Ireland and their succes-
“sors, yet the said defendant, although often requested so to do,
“hath not,” &c.

Plea.—The defendant then craved oyer of the said writing obli-
gatory, which was read to him, and of the condition of the said writ-
ing obligatory, which was read to him, in these words:—“Whereas
“the above-bounden W. S. (the defendant) has been appointed by
“the above-mentioned Commissioners to the office of pay-clerk of the
“said Commissioners; now the condition of this obligation is such,
“that if the said W. S. do and shall from time to time, and at all
“times hereafter during his continuance in his said office, faithfully,
“honestly, diligently and carefully execute, perform and discharge
“the duties of said office, and shall, so soon as he shall or may from

"time to time be thereto required, give and deliver in writing a
 "just and true account of all moneys, papers, writings, books or
 "other things which in his said office shall or may come to the
 "hands of the said W. S., and which he shall be entrusted with,
 "and also make good answer for, and pay the moneys due on the
 "balance of such account to the said Commissioners or their succes-
 "sors, or such person or persons as the said Commissioners shall
 "appoint; and shall and do moreover well and sufficiently save
 "harmless and keep indemnified the said Commissioners and their
 "successors from and against all losses, damages, actions, suits,
 "costs, charges and expenses which may be sued, commenced or
 "prosecuted, or which they the said Commissioners or their succes-
 "sors may bear, sustain or be put unto, for or by reason or means
 "of any matter, cause or thing whatsoever committed, neglected,
 "omitted or suffered to be done by the said W. S. in or during his
 "said office or department, then this obligation to be void and of
 "non-effect, or else to be and remain in full force and virtue;"

which being read and heard, the said defendant saith that he did
 from time to time, and at all times after the making of the said
 writing obligatory, and the said condition thereof, and before the
 exhibiting of the said bill of the said plaintiff in this behalf,
 faithfully, honestly, diligently and carefully execute, perform and
 discharge all and singular the duties of said office, and did from
 time to time during all the time aforesaid, as he was thereunto
 required, give and deliver in writing a just and true account of all
 moneys, papers, writings, books or other things which in the said
 office did come to the hands of him the said defendant, or which
 he was entrusted with, and did from time to time during all the
 time aforesaid, make good answer for, and pay all and singular the
 moneys due on the balance or balances of such account or accounts
 to the said Commissioners, or to such person or persons as they,
 during all the period aforesaid, did appoint, and did moreover well
 and sufficiently save harmless and keep indemnified the said Com-
 missioners and their successors from and against all losses, damages,
 actions, suits, costs, charges and expenses which might be or were
 sued, commenced or prosecuted, or which they the said Commis-

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sioners or their successors might or did bear or sustain, or might be or were put unto for or by reason or means of any matter, cause or thing whatsoever committed, neglected, omitted, or suffered to be done by him the said defendant in or during his said office or department, according to the tenor and effect of the said condition of the said writing obligatory ; and this the said defendant is ready to verify, wherefore he prays judgment, &c.

Replication, that the said plaintiff ought not to be barred, because he says that the said defendant, in the said condition of the said writing obligatory mentioned, remained and continued in the service and employment of the said Commissioners of Public Works, as such pay-clerk as in the condition in said writing obligatory mentioned, for a long space of time, to wit from, &c., until, &c. ; and the said plaintiff protesting that during the said time that the said defendant so remained and continued in the said service and employment of the said Commissioners as such-pay clerk, he the said defendant did not from time to time, and at all times after the making of the said writing obligatory, and the said condition thereof, faithfully, honestly, diligently and carefully execute, perform and discharge all and singular the duties of the said office in the said condition of the said writing obligatory specified, comprised and mentioned, according to the tenor and effect, true intent and meaning of the said condition of the said writing obligatory : the said plaintiff for a breach in fact saith, that although the said defendant did, during the said time that he so remained and continued in such service and employment of the said Commissioners as such pay-clerk as aforesaid, to wit, &c., when required so to do, give and deliver in writing to the said Commissioners an account of the several sums of money which in the said office came to his hands, and although there was on the balance of said account a large sum of money, to wit, the sum of £350, due to the said Commissioners by the said defendant, yet the said defendant did not make good answer for, or pay to the said Commissioners the sum so due on the balance of said account to the said Commissioners, although the said defendant was afterwards, to wit, on the day and year last aforesaid, at the place aforesaid, requested so to do, but hath therein wholly failed

and made default, and the said sum of money, to wit, the sum of £360 so due on the balance of such account, is still wholly unpaid and unsatisfied to the said Commissioners, contrary to the form and effect of the said condition of the said writing obligatory, to wit, &c.; and this he is ready to verify, wherefore he prays judgment, &c.

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Rejoinder.—And the defendant, as to the said replication to his said plea, saith that the plaintiff ought not, &c., because he saith as to the sum of £64 sterling, parcel of the sum due on the balance of the said account in said replication mentioned, that whilst he the defendant continued in the service and employment of the said Commissioners of Public Works in Ireland, as such pay-clerk, and after the giving and delivery of said account in said replication mentioned, and after he the defendant was so requested, as in said replication mentioned, and before the exhibiting of the plaintiff's bill in this behalf, to wit, on the day and in the year, and at the place in the said replication mentioned, he the defendant did pay to the said Commissioners, &c., the said sum of £60 sterling, parcel of said sum due on the balance of said account in said replication mentioned; and as to the sum of £290, the residue of the sum due on the balance of said account, the defendant saith that whilst he continued in the service and employment of the said Commissioners, &c., as such pay-clerk, and after the giving and delivery of the account in said replication mentioned, and before the exhibiting of the bill of the plaintiff in this behalf, to wit, on the day and year and at the place in said replication mentioned, he the said defendant did make good answer for the said sum of £290 sterling, the residue of said sum so due on the balance of the said account to the said Commissioners, &c., in manner following; that is to say, that after the giving and delivery by the defendant of the said account, as in said replication mentioned, of £290 sterling, the residue of the said sum mentioned, and whilst the said sum so due on the balance of the said account remained in the hands of the defendant as such pay-clerk, and before such request made, in the said replication mentioned, and before the exhibiting of the bill of the plaintiff in this behalf, to wit, on the day and year, and at the place aforesaid, the defendant, as such pay-clerk, necessarily and unavoidably had the

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said sum of £290 sterling, the residue of the said sum so due on the balance of said account, in his the defendant's custody, upon a public highway situated at, &c., to wit, at the place and in the county of the city in said replication mentioned; and whilst the defendant was then and there necessarily and unavoidably travelling and returning upon and along the said public highway from the place where he had been discharging and performing his duties as such pay-clerk, unto and towards his the defendant's residence, certain, to wit, twenty malefactors, to the defendant unknown, upon him the said defendant did then and there feloniously make an assault, and him, the said defendant, in bodily fear and danger of his life then and there feloniously did put, and the said sum of £290 sterling, the residue of the said sum so due on the balance of said account, from the person and custody, and against the will of the said defendant, then and there feloniously and violently did steal, take and carry away; of all which the defendant immediately afterwards, and before the exhibiting of plaintiff's bill, to wit, on the day and year aforesaid, &c., gave due notice to the said Commissioners, &c., and afterwards, after the defendant was required by the said Commissioners to make good answer for the said sum of £290 sterling, the residue of said sum so due on the balance of said account, as in said replication mentioned, and before the exhibiting of the plaintiff's bill in this behalf, to wit, &c., the said defendant, upon being so requested, did make good answer to the said Commissioners for the said sum of £290 sterling, the residue of the said sum so due on the balance of said account in manner aforesaid; and this the defendant is ready to verify, &c.

General demurrer.—The following points were noted for argument; first, because the alleged felonious taking and carrying away of the said sum of money, the balance due on the said defendant's account as in said rejoinder stated, is no answer in law for the breach of the condition of the said bond in plaintiff's replication; secondly, that the facts set forth in the said rejoinder do not amount to a performance of the condition of the said bond, the breach whereof is set forth in the plaintiff's replication; thirdly, that the said rejoinder is not, as it professes to be, in confession and avoidance of the plain-

tiff's replication ; fourthly, and that it evades the issue tendered by the said replication, and is not a traverse.

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J. Perrin, for the demurrer, contended that the matters averred by the rejoinder as an excuse for non-performance of the conditions of the bond could not be maintained as such, as the non-performance could only be excused by acts of the obligee. *Vere v. Smith* (a) is the strongest case that can be relied on by the other side ; but that case is clearly distinguishable from this. In *Vere v. Smith*, the defendant rejoined "that the defendant had a desk in plaintiff's "counting-house in which he put the money ; that certain malefactors "broke into his (the plaintiff's) counting-house and stole it, where- "with he acquainted the plaintiff." There it was the act of the obligee to leave his counting-house in such an unguarded position that it could be broken into and robbed. It also appears from the report of that case that the decision of the demurrer was adjourned, and that the demurrer was afterwards waived, and issue taken on the robbery. Neither is that case cited in *Com. Dig.*, or *Roll. Abr.* ; and therefore not to be deemed of much authority. To show that it is only by the acts of the obligee that the obligor can be discharged from the performance of the conditions he binds himself to perform, Counsel cited *Com. Dig.*, tit. *Condition*, L. 6 ; *Roll. Abridg.*, p. 454, n. 8, and the cases collected in *Ch. on Covt.*, 4th ed., p. 630.

Carleton, in support of the pleading, relied on *Vere v. Smith* (b) as completely in point, and referred to the reports of the cases in *Keble* and *Ventris* as showing that a decision had been pronounced in the case, and cited *Stephens on Pleading*, p. 382, &c.

In *Coggs v. Bernard* (c), there are five species of bailment enumerated by Lord Holt. The fifth species is called "*locatis operis faciendi*." The definition of that species is given in 1 *Smith's Lead. Cas.*, p. 101, 3rd ed., thus :—"In this case goods are entrusted by the bailor to the bailee to be safely kept, or to be "carried, or to have some work done upon them for hire to be paid

(a) 2 Lev. 5 ; S. C. 2 Keb. 761, 779, 830 ; 1 Vent. 121.

(b) *Vide supra*.

(c) 2 Ld. Raym. 909, 914.

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"to the bailee." This is a case of bailment of the fifth species, and there is no liability in case of robbery—robbery distinct from stealing—the distinction is taken in 10 *Hen.*, pp. 6, 21.

Counsel also cited *Banion's case* (8 *Ed.* 2); *Fitzh. Abr.* Detiane, 59; *Sir William Jones' Bailm.* p. 39; *Southcote's case* (29 *Lib.*); *Assizarium, Pl.*, p. 28; *Buller's N. P.*, p. 70; *Ross v. Hill* (a); *Noy's Maxims*, p. 92; *Woodliffe's case* (b); 1 *Roll. Abr.*, p. 2; *Rich v. Knoeland* (c); *Mors v. Slew* (d); *Brind v. Dale* (e); *Wood's Inst. Cre. Law*, B. 1, C. 1, p. 27; *Sir William Jones' Bailm.* p. 119; 1 *Smith's Leading Cas.* p. 101, 3rd ed.; *Hatchwell v. Cooke* (f); *Hodgeon v. Fullarton* (g); *Nettle v. Bromsall* (h); *Doorman v. Jenkins* (i).

G. Fitzgibbon followed on same side.

The *Attorney-General*, in reply, referred to 3 *Byth.* p. 345:—"When the performance of the condition of a bond becomes impossible by the act of the obligor or of any other person than the obligee, such impossibility forms no answer to an action on the "bond;" and contended that the law as there stated could not be controverted.

PREOT, C. B.

This case has been rested on two grounds:—First, the authority of *Vere v. Smith*; secondly, the analogy between this case and contracts of bailment. The case of *Vere v. Smith* is clearly distinguishable from the present. There the clerk lodged the money in a desk in his master's counting-house. The counting-house was broken into and the money was abstracted from the desk. Under such circumstances the money may be considered to have been

(a) 2 C. B. 877.

(b) F. Moore, 402.

(c) Cro. Jac. 330.

(d) 1 Vent. 120, 226; Sir T. Bay. 220.

(e) 8 C. & P. 207.

(f) 6 Tamm. 577.

(g) 4 Tamm. 787.

(h) Willes, 118.

(i) 2 Ad. & El. 256.

delivered into the custody of the master ; and therefore the contract of the clerk was performed, or it may have been considered as the master, the obligee, had not provided sufficient means to protect his counting-house from robbery, the clerk was excused from performance by the act of the obligee. With respect to the second ground, the authorities have been most clearly stated, and an able historical review has been given of them by Mr. *Carleton*. And if this was the case of a bailment, the principle of those cases might be applicable to a contract which did not amount to more than an obligation to act as a bailee. But this is not a contract of that nature. It is a contract under seal to do specific things ; and the liability of the obligor must be determined by the construction of the contract itself. The bond is conditioned for these specific matters—namely, that the defendant “shall, so soon as he shall from time to time be thereunto required, give and deliver in writing a just account of all moneys, &c., which in the said office shall or may come into the hands of the said William Launcelot Slack, or which he shall be entrusted with: *and also make good answer for and pay* the moneys due on the balance of such account to the said Commissioners or their successors, or to such person or persons as the said Commissioners shall appoint ; and shall and do moreover well and sufficiently “save harmless,” &c.

M. T. 1859.
Eschequer.
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Upon his obligation to account there is no question. He delivered an account charging himself with a balance. Then as to the obligation to answer for and pay, the defendant avers that he satisfied that obligation without paying the money. Now the object of this contract plainly is, that the money which the defendant gets shall be paid, and in such a contract the acts of third parties, strangers, can be no answer ; the act of the obligee will excuse performance, but not the act of a stranger.

If a party contracts to perform even what is impossible, he binds himself, and must answer for the consequences of non-performance. Here the defendant has contracted to pay money ; he has not paid it, and a calamity not provided for in the contract cannot exonerate him from liability. It is asked, would the party be liable for the balance of the account, even though he had paid it away to the

M. T. 1850. workmen in discharge of his duty? I yield to that argument. I
Eschequer.
think that might be a payment, the proof of which might be an
HORNBY "answering for" the money so paid; but here that was not done.
v.
SLACK. The defendant has not paid the balance of the account. The con-
tract has therefore been broken. There must be judgment for the
plaintiff; and he seeks to discharge himself not by payment, but
by a calamity which he says has prevented payment.

LEFROY, B.

This case is a very simple one. The argument for the defendant amounts to this; that we must construe this contract as if there had been an exception in the case of robbery—no rational man would enter into such a contract; much less could a board, acting on behalf of the public, be expected to do so. Such a construction then is repugnant to any reasonable intendment, as much as to the terms of the contract. The contract is to pay, and it cannot be frittered away by the other words of the contract, or by refining on them. He was not in the light of a servant or messenger who was employed to carry a particular sum of money for a special purpose, and was robbed of it on his way. He was a clerk entrusted with moneys for which he was to account. He had accounted and paid a portion of his balance; the residue he retained and carried about at his own risk. I admit he says he was travelling as a pay-clerk, and necessarily had the money; but what was the necessity? He was bound to have paid it. He was under no necessity to keep it, and must therefore be answerable for it according to his contract. The cases cited with respect to contracts of bailment, or for the conveyance, &c., of goods, do not apply. There the law measures the liability according to the nature of the duty and the implied undertaking; but here we have to do with the express engagement of the party. He has made his own contract, and must discharge himself by the terms of it. No matter *dehors* will be sufficient, except it may be the acts of the obligee, if prevented thereby from performing his contract, of which there can be no pretence here.

Judgment for the plaintiff.

M. T. 1850.
Eschequer.

M'MAHON v. CORBETT.

Nov. 28.

MR. W. BRERETON moved on an affidavit that Mr. Scriven should vacate the registry of a certain judgment, registered in his office, at the conusee's expense, and that the costs of obtaining the judgment be added to the judgment on the roll.

Where the costs of obtaining a judgment are not added thereto before registry, it is requisite, in order to have them added, to vacate the registry already had.

The affidavit stated that the defendant had agreed to pay the amount of the judgment and costs in a certain manner; and in consequence the costs were not taxed and added to the judgment before it was registered. The defendant had not fulfilled his engagement, and it is now sought to have the costs added to the judgment on the roll, in order to have the judgment and costs both registered; but to do that, it is necessary to vacate the registry already had.

PENNEFATHER, B.

You are entitled to the order.

Mr. Brereton.

And to the costs of the motion, as there has been bad faith?

PENNEFATHER, B.—No.

H. T. 1851.

Eschequer.

M'KEOGH v. GALLAGHER.

Nov. 18.

The redocketing of a judgment amended by substituting the name "Peter" for the name "John" as the christian name of the plaintiff, under special circumstances.

MR. LAWLESS applied to the Court for an order on the Registrar of Judgments to correct an error in the redocketing of the judgment in this case, by substituting the name "Peter" for the name "John," as the Christian-name of the plaintiff. The affidavit of the plaintiff Peter M'Keogh stated that in or as of Trinity Term 1836, he under the name of Peter M'Keogh obtained a judgment against the defendant Mathew Gallagher for £700, with £2. 3s. costs. That on the 31st of October 1844 the plaintiff made the usual affidavit for the purpose of having said judgment redocketed pursuant to 9 G. 4, c. 35. That it appeared from the redocketing book that the said judgment was redocketed by mistake in the name of John M'Keogh, and not of Peter M'Keogh, which is the plaintiff's true name. That the said judgment had never been redocketed otherwise than in the name of John M'Keogh, on the 31st of October 1844, and that no judgment for that amount or of that Term against said Mathew Gallagher has been redocketed in the name of Peter M'Keogh.

The affidavit upon which the judgment was redocketed stated the name of the plaintiff correctly, as appeared by the affidavit produced in Court.

Mr. Lawless submitted that the error clearly originated with the officer, and that his client would on that ground alone be entitled to the order sought.

LEFROY, B.*

Under the circumstances, I think you are entitled to the order.

* *Solus.*

H. T. 1851.

Eschequer.

Lessee SCULLY v. CASUAL EJECTOR.

Jan. 21.

MURPHY applied, on behalf of the lessor of the plaintiff, for an order on the officer to permit a *scire facias* to revive the judgment in this cause to be issued as of course pursuant to the provisions of the 168th General Order; and in support of his application referred to *Kelly on Scire Facias*, pp. 134, 135, 140, to show that the practice had been to revive judgments in ejectment by *scire facias*; and to show also that in the Queen's Bench the practice had been to issue the *scire facias* as of course at any time within ten years; and submitted that although the practice in this Court had been different hitherto, it seemed probable that for the sake of uniformity of practice the Queen's Bench practice had been adopted by all the Courts in framing the General Orders.

Scire facias to revive a judgment in ejectment, not to issue as of course under the 168th General Order.

PENNEFATHER, B.

The Rule was never intended to apply to judgments in ejectment.

Motion refused.

DALY v. COTSMAN.

Jan. 23.

B. STEPHENS applied to the Court, on behalf of the plaintiff, the payee of a promissory note, for liberty to file a declaration in this case, deviating from the form prescribed by the General Orders.

Action by payee against maker of a note, made payable in the body of it at a particular place.

Form in schedule to General Orders inapplicable, as presentment necessary to be averred.

Liberty given to depart from form in schedule, and costs of the motion.

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v.

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The action was against the maker of a promissory note, made payable in the body of it at a particular place; and it is necessary to aver in the declaration and prove at the trial presentment at that particular place. By the 13 *Vic. c. 18, s. 18*, the Judges are required to provide a plain and simple form of declaration, which in certain actions (therein mentioned) is to be used, and no other, unless the Court in which such action is brought shall on motion make an order to the contrary.

By the 46th General Order the Judges have accordingly provided that "The forms of declaration in the first schedule to these Orders, with such variations according to the directions herein as each case may require, shall be used in all cases within the 18th section of the statute 13 *Vic. c. 18*."

Counsel having then read the form of the count on a promissory note by payee against maker, given in the first schedule to the General Orders, stated that in that form there is no averment of presentment at the place mentioned in the body of the instrument, and the omission would be fatal at the trial. The necessity for the application arose from the negative words of the Act, "that no other form" should be used than that settled by the Judges.

LEFROY, B.

If the form settled and approved of by the Judges under the Act of Parliament omit that averment, may not it have been intended to dispense with the necessity for it in future?

Mr. *Stephens*.

The Judges in England held that the Rules framed under the English Act of Parliament analogous to the Practice and Process Act did not dispense with the necessity for averring presentment, although the authority given by the English Act was quite as extensive. It appears quite clear that if the plaintiff proceed to trial on the present form, there will be a variance between the promissory note and the declaration. The averment also at a particular place is a substantial one and ought to be made.

FIGOT, C. B.

We think you must have permission to depart from the form prescribed, as it is not applicable to the circumstances, and you must also have the costs of the application of the present case. The design of the Act is a good one, but it is very difficult, if not impossible, to do all that is required by the Act, viz., to enable a person who knows nothing of pleading to draw his own declaration in certain cases.

H. T. 1851.

Eschequer.

DALY

v.

COTSMAN.

RYAN v. NUNAN.

Jan. 27.

DWYER moved for an order to amend the registration of the judgment in this cause, by adding the sum of £16, being the amount of the taxed costs, in lieu of the sum of £6, which sum had been improperly added to the judgment on the roll for costs by the officer, and in consequence was the sum appearing on the registry for the costs.

The registration of a judgment cannot be amended by adding thereto the taxed costs in lieu of a sum improperly added to the judgment on the roll before registry, and in consequence registered.

Counsel stated that the defendant was resident out of the jurisdiction of the Court, and substitution of service of the writ of summons was rendered necessary; that this case was therefore within the proviso to the 19th section of the Practice and Process Act, and that the officer had no jurisdiction to add to the judgment £6 for costs, or any other sum save the amount of the taxed costs.

FIGOT, C. B.

The course to be adopted, if you desire it, must be to vacate the registry and the judgment on the roll at the conusee's expense; and you cannot have the costs of this motion. It would clearly lead to expense greater than the difference between the present costs and the taxed costs to adopt this course. So probably you will allow the matter to rest in *statu quo*.

Counsel acquiesced in the suggestion of the Court.

H. T. 1851.
Queen's Bench

Lessee ——— v. ———.

(*Queen's Bench.*)

Jan. 11.

The trustees of a legal estate being allowed to take defence to an ejectment, although not served, the Court will not, on the hearing of the application for permission so to do, make an order that they shall give security for costs; a substantive application must be made for that purpose.

J. D. FITZGERALD, on behalf of certain trustees, moved that they might be at liberty to take defence to the ejectment in this cause, although they were not served. This was an ejectment on the title, and the legal estate in the lands the subject of the ejectment, was vested in the trustees, on whose behalf the application was made.

J. F. Walker appeared for the lessor of the plaintiff, and submitted that the applicants, being resident out of the jurisdiction, ought to give security for costs if the Court granted the motion.

*Per Curiam.**

We will grant the application; and if the lessor of the plaintiff require security for costs to be given, a substantive motion must be made for that purpose.

* *Coram* BLACKBURN, C. J., and MOORE, J.

H. T. 1851.
Queen's Bench

THOMAS ROPER v. ROBERT ROBINSON.

Jan. 11.

SEMPLE moved that the officer be directed to issue a *capias ad satisfaciendum* in this case.

In this case an action had been brought against the defendant to recover the sum of £16. 10s., and a judgment had been obtained in that action. The costs amounted to £10. 10s., and judgment had been marked and execution issued for a sum of £27. A *fi. facias* was thereupon obtained, and under this writ of *fi. facias* the Sheriff levied a sum of £8, which he had paid over to the attorney for the plaintiff, who applied same in part discharge of his costs. The officer, conceiving that the attorney was bound to apply that sum in part payment of the original debt, which would thus render the amount due below £10, and that therefore, under the statute 11 & 12 Vic. c. 28, providing that no *ca. sa.* or other writ or process to arrest a defendant should be issued when the sum due, exclusive of costs, should not exceed £10, the defendant should not be arrested, refused to issue the writ.

Where an execution issued on a *fi. fa.*, and the Sheriff levied a sum reducing the original debt below £10, exclusive of the costs:—
Held, that under such circumstances the plaintiff was entitled to issue a *ca. sa.*

Per Curiam.

The plaintiff is entitled to issue a *capias ad satisfaciendum*. The officer has no power to separate the debt in this way. The payment made was applicable only to the gross sum.

Take the order.

H. T. 1851.

Queen's Bench

1850.

Jan. 12, 14,
25, 29.

SAMUEL WAUCHOB, *Appellant* ;
JOHN REYNOLDS, *Respondent*.

A, being lessee of premises in the borough of D. (which, prior to his lease, had been rated for the relief of the poor), demised the back premises thereof to B, and subsequent to such demise A was again rated as for all the premises contained in the original rating. *Held*, that notwithstanding such alteration of possession of part of the premises, A was entitled to be enrolled as a burgess.

In this case a conditional order had been obtained under the 50th section of the Municipal Corporation Act (3 & 4 Vic. c. 108), directing that the name of John Reynolds should be erased from the burgess roll of the city of Dublin.

The *Attorney-General* (Monahan), with him *Martley* and *Sir C. O'Loghlen*, showed cause against this conditional order.

Napier, F. Fitzgerald and Dix, contra.

The following cases were cited in the course of the argument:—

Duigenan's case (a); *Toms v. Luckett* (b); *Waugh v. The Treasurer of the city of Cork* (c); *Regina v. Ruston* (d); *Regina v. Savage* (e); *Downing, appellant, Luckett, respondent* (f); *Rez v. The Inhabitants of Ditchat* (g); *Rez v. The Inhabitants of North Collingham* (h); *Fludier v. Lombe* (i).

Cur. ad. vult.

A did not reside on the premises, but paid the rent and taxes, retaining the two parlours for his exclusive use as a counting-house; he sub-let the house to C, his servant, who resided on the premises, and she let the other apartments to lodgers, reserving to herself the rent. *Held*, that such was not an occupation of the premises by A within the meaning of the Municipal Corporation Act, as entitled him to be enrolled a burgess.—[*PERAIN, J., dissentiente.*]

Held also, A being the lessee of the entire house, and rated as such, was not entitled to be registered as a burgess in respect of his occupation of a portion of it as a counting-house, that portion not being rated separately as such.

(a) *Al. Reg. Cas.* 114.

(b) 5 C. B. 23.

(c) 11 *Ir. Law Rep.* 451.

(d) 3 *Ir. Law Rep.* 478.

(e) 2 J. & Sy. 667.

(f) 5 Q. B. 40.

(g) 9 B. & C. 176.

(h) 1 B. & C. 578.

(i) *Cas. temp. Hard.* 292.

NOTE.—The facts of the case fully appear in the judgment of the Court.

The Court delivered judgment.

PERRIN, J.

In this case a conditional order was obtained on the 21st of November, in the matter of the appeal of Samuel Wauchob against the admission of John Reynolds upon the burgess roll of the borough of Dublin.

Three grounds of objection to his claim have been relied on. He claimed as a householder; and the first of the objections to that claim was, that he was not in occupation of the whole of the premises for which he was rated; there were two branches of that objection. The second objection was, that a portion of the premises, in right of which he claimed to be placed upon the roll, viz., a counting-house, was not valued or rated separately under the Poor-law; and the third objection was, that this latter claim was not duly made, or the value of that portion of the premises duly ascertained.

The qualifications entitling a person to be put on the burgess-roll, under the 3 & 4 Vic. c. 108, s. 30, are six months' residence in, or within seven miles of, the borough,—the occupation of a house, ware-house, counting-house or shop, of the value of not less than £10 a-year, to be ascertained by the Poor-law valuation rating, in respect of the premises for that period—and the payment of all taxes and charges payable by him in respect of the premises.

There are difficulties in dealing with this case, as the appeal states no grounds of objection; and the conditional order is framed in general terms, calling on the Court by an application, in the nature of a *quo warranto*, to deprive a person of the franchise.

With respect to the first objection. It appears by the affidavits that on the 27th of May 1844, James Lefanu demised a dwelling-house, No. 10 Fleet-street, with back ground, out-offices and rere entrance, to John Reynolds for a term of thirty-five years, at a yearly rent of £45. In June 1844 Reynolds let the out-offices at the end of the yard to John Wisdom at a rent of £10, and these out-offices were thereupon detached by Wisdom from Reynolds' premises, and the rere entrance closed. Reynolds being only in possession of the house which he has since

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Queen's Bench

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1850.

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H. T. 1851. occupied, was in February 1845 rated in respect of these premises,
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 REYNOLDS. which in the rate-book are described as a house of four stories, with
 yard and inferior out-buildings, with rere entrance, valuation £50
 per annum. He was not then in possession of any building at the
 end of the yard, and had no rere entrance ; but he was in possession
 of a house, yard and building in it. It further appears that, before
 he had any interest in the premises, they had been valued by the
 Poor-law Commissioners, and they then comprised the stable, yard
 and rere entrance, and were valued and rated so. He has, however,
 since June 1844, occupied only the remaining portion of the premi-
 ses ; he therefore could not be legally rated for more than he
 occupied, and he accordingly was so rated.

It is said that the word "building" in the later ratings was sub-
 stituted for "buildings" in the earlier ones, and that this substitution
 shows the intention was so to rate him. I cannot go the length of
 saying that alteration was made advisedly ; but supposing there was
 an error, there was a fresh rating and valuation made every year
 on the occupier, who was only liable for premises in his occupation ;
 and we must presume his name was properly placed upon the rate.
 It would be absurd and unjust to rate Reynolds for a thing not in
 his possession, therefore although there may be an inaccuracy in
 the description of the premises, that inaccuracy is provided for by
 6 & 7 Vic. c. 93, s. 27, which enacts, that a party is entitled to be
 enrolled out of premises which he occupies in the manner therein
 provided, notwithstanding there be any insufficient description in
 any rate of the person so occupying, or of the premises occupied. I
 therefore see no ground to hold that Reynolds was not in the occu-
 pation of the whole of the premises for which he was rated ; he was
 not liable to be rated for premises not in his occupation. Wisdom
 was liable for that portion ; so that as to that part of the objection,
 that Reynolds was rated for any portion of the premises in Wisdom's
 occupation, I hold it to be untenable.

As to the second branch of that objection. It is said Reynolds
 never resided in the house, but that he had let the entire of it, with
 the exception of two rooms on the ground floor, to Sarah Keogh,
 who resided in it, and sub-let several of the apartments to attorneys,

who had their registered lodgings there, paying her rent, she keeping the key of the outer door; and that the two rooms so reserved were not of the value of £10 a-year. Reynolds says he did not sleep in Fleet-street, but let the apartments to Sarah Keogh (who is his servant) at a rent of £45 a-year as a lodger; that he retained dominion over the outer door of the house, and that the persons who occupied the rooms in it were mere lodgers. That he retains in his occupation the front and back offices, and that he pays the rent and taxes, and that none of the parties in the house were rated; he therefore was the legal tenant in possession for all purposes.

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It has been long since decided that the occupation of lodgers is the occupation of the householder, and that the letting of lodgings does not render the householder less an occupier. In the case of *Fludier v. Lombe*, Lord Hardwicke takes the distinction between occupation of a house and occupation of apartments. He says:—"A lodger was never considered by any one as an occupier of a house; it is not the common understanding of the word; neither the house, nor even any part of it, can be properly said to be in the tenure or occupation of the lodger." And in *Rex v. The Inhabitants of Ditsheat* (a) Littledale, J., says:—"It is laid down that no lodger, though possessing the principal part of the house, was ever rated; but the owner, how small soever the part reserved for himself, is in the eye of the law the tenant for the whole, and is rated as the occupier." And in *Cooke's case* (b) Brady, C. B., says:—"All the cases, unquestionably, go to establish the point that occupation does not necessarily imply residence, and there may be occupation for a variety of purposes;" and he adds, with reference to householders in cities:—"All the cases of such occupation seem to me to be of this character, that, for some purpose or other, the premises were held for the personal accommodation, convenience or advantage of the owner, and made use of as a residence, shop or warehouse, for himself or his servants; and, in such a case, if the owner let a portion of the premises to tenants or lodgers, they would be deemed to be his inmates." So in the present case the house was

(a) 9 B. & C. 184.
 VOL. I.

(b) 1 Cr. & D. 604.
 L 19

H. T. 1851. *Queen's Bench*
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 REYNOLDS. rented by Reynolds, and the principal part of it was used by him for his own personal accommodation, convenience and advantage; besides, his servant remained living in it under his control, and kept the key of the hall-door; and connecting that with the position laid down by Littledale, J., it cannot be said that sleeping in the house is essential to occupation.

It does seem to me that the judgment of Brady, C. B., gives a fair and plain exposition of the term "occupation," and that according to it, and the facts of this case, it is but just to hold that Reynolds does occupy this house, although he is not in the possession, and has not the control over, or right to enter into, perhaps the greater number of the apartments. He does, however, occupy the house for his own personal advantage and convenience. *Duignan's case* appears to me to bear very strongly on this part of the case. In that case my Brother CRAMPTON says:—"The claimant must be the occupier of an entire house, and he must in contemplation of law be the sole occupier of that house; not that he must be a solitary resident therein, but that he alone occupies as owner or tenant, and that all the other residents are such only by his permission and under his authority. The owner or tenant of the house, he who has the dominion over the outer door, who is the permanent possessor of the outer door, the householder, and in that capacity liable to the payment of rents and rates, may thus be deemed to be the legal occupier of the whole house, though certain parts of the house are in fact occupied by lodgers."

Now Reynolds certainly was in occupation of the parlour, passage and outer door; that was sufficient occupation. It need not be a personal occupation of every room in the house; and there is nothing to show that either Sarah Keogh or the lodgers were independent lodgers of their respective tenements. They are not the owners of the house, neither is it shown that they had such an occupation as would give them a right to be enrolled as burgesses. The power and authority given to Sarah Keogh to sub-let does not make her different from a lodger. She would not be entitled to a notice to quit; her interest would determine at the end of the year. Reserving to her the care of the outer door, would not alter her position

from a lodger to a lessee. Reynolds alone is rated for the house. H. T. 1851.

I may here observe, his claim to be rated as the occupier of a counting-house is quite inconsistent with his occupation of the entire house. With respect to that he states that he, in May 1848, served notice on the Poor-law Guardians of a claim to be rated in respect of a counting-house. That claim was, however, properly disallowed, and I do not see how the Guardians could have entertained a claim of a lessee of a house liable for the entire rates due upon it, and having in fact paid them, to have his rate reduced to what would be due for a counting-house, without suggesting any other persons as liable to be rated for the remainder of the house. With respect to that, however, it is unnecessary, from the view I have taken of the case, to give any opinion.

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It appears to me that the party impugning Reynolds's right should show that Sarah Keogh had a separate independent right; and that we should have the facts satisfactorily before us when called on to disfranchise a party. The holder of apartments or lodgings is under the control of the owner of the house, especially if he occupy any part of it. The rules with respect to the tenure of lands and houses do not apply to lodgings. The terms under which lodgings are held are determined by the contract, and there is no necessity for a notice to quit; and further, during the continuance of the interest, the parties holding the lodgings are under the control of the owner of the house, who, to a certain extent is answerable for their conduct; if he permit immoral conduct in those apartments, he loses the right to the rent; and that is inconsistent with the notice of an independent occupation and separate interest.

It was contended that this case was governed by the case of *Toms v. Luchett*. That case decided that one who has the exclusive occupation of apartments in a house, at a rent, having the key of the outer door, and free and uncontrolled access thereto at all times, the landlord occupying a portion of the premises, but not residing therein, was entitled to be registered. In that case, the fact that there was no outer door under the control of the landlord was wanting; it therefore has no bearing upon the case now before us.

H. T. 1851. As to the cases upon Crown Law, I do not find any case among
Queen's Bench them militating with the view I have taken.

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REYNOLDS. Upon the whole, it appears to me that a householder does not
 lose that character while he continues to occupy any part of the
 premises for his own use and advantage by taking in any number
 of inmates; but, as a badge of that occupation, he must not lose the
 right of entrance to the outer door where the house begins. Upon
 these grounds I am of opinion Reynolds must be considered as the
 occupier, therefore it becomes unnecessary that I should consider
 the third question.

CRAMPTON, J.

With respect to the construction both of the Act of Parliament
 relating to the registering of freeholders and of that relating to the
 admission of persons to the municipal franchise, there is no such
 rule as that relied upon at the Bar, namely, that if any doubt or
 difficulty should be cast upon the case, the Court should always lean
 in favour of the franchise. My impression is that the construction
 of the Act to be adopted by the Court is, that we ought not to
 exclude any individual from the burgess roll that the Act required
 to be included in it, and ought not to include any individual that
 the Act required to be excluded from it. The Court here is sitting
 in the exercise of a statutable jurisdiction. There are two sections
 of the Municipal Act under which it derives that jurisdiction. The
 50th section enacts, that the right of any burgess to be upon the
 roll may be questioned by any other burgess by appeal; and the 9th
 section enacts, that the matter may be brought before the Court of
 Queen's Bench within the period limited for issuing informations of
quo warranto. The Legislature have substituted for that mode of
 proceeding the summary method of proceeding by motion by way of
 appeal to this Court. I do not say it did away with the proceeding
 by *quo warranto* in all cases; but it would require a strong case
 to oblige the Court to say that it would not exercise its jurisdiction,
 but would leave the parties to a *quo warranto*; and I may say
 here that the case of the respondent comes before the Court in a
 much better shape for him now than it possibly could, had the pro-

ceedings been taken by way of *quo warranto*, in which case his own affidavit could not have been used.

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It has been urged at the Bar that the *onus probandi* in all such cases lies upon the objector, but the *onus* is upon the claimant, and that by express enactment. The 45th section of the Municipal Act enacts, that where an objection to the qualification of a burgess is properly brought before the Court below, it should require proof of the qualification of the person so objected to; and that in case that qualification was not proved by him to the satisfaction of the Court, his name should not be recorded upon the burgess roll. Now the Court is here dealing with an appeal motion, and I am perfectly warranted in saying that we should administer the law exactly as it would be administered by the Court below.

It has been said that the matter comes before the Court in an unsatisfactory way, being brought forward upon affidavits. It could not come before it in any other way; and I may say, if there is any difficulty in the case—though I have not felt any from the beginning—it has been introduced by that which did not come before the lower tribunal; for there was no affidavit of the respondent before the Lord Mayor and his assessors, nor was he examined as a witness before them, though he might have offered his testimony to them; and now he comes forward with an affidavit, suggesting, I will not say facts, but inferences of law from facts appearing upon his own affidavit, and directly in contradiction to the view taken by himself of his own case when he put forward his claim to be enrolled a burgess as the occupier merely of a counting-house. Therefore if there was any difficulty whatever in the case it has been introduced by himself.

The questions upon which the Court is bound to pronounce its judgment have been very ably argued at the Bar. The first of these is, whether or not the respondent was the occupier, within the meaning of the Municipal Act, of the entire of the premises in respect of which he was rated? There is not the least doubt that he was the owner of the house, and that he is liable to pay the rate for it. The present is not a question, however, of rating, but a question of occupation. Is the respondent the occupier of the entire pre-

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mises? If he be not, unless he can derive aid from the 33rd section of the Act, it is quite clear that his name ought to be struck off the burgess roll. If he is the occupier of only a part of the premises, it is equally clear that the decision of the assessors and of the Lord Mayor upon the particular question now under consideration was the right decision. The second question is, if he was the occupier of only part of the premises, does his notice of claim to be rated as the proprietor of a counting-house entitle him to the franchise? Upon the first question the Court below were unanimous in favour of the objector; and upon the second the Lord Mayor gave his decision in favour of the franchise, very possibly with a view, as has been suggested, of allowing the matter to be brought before the Court of Appeal.

Now, if I am not very much mistaken, there would have been no difference of opinion on the Bench with respect to the case if it had come before them without the affidavit of the respondent. The respondent was confessedly the lessee of No. 10 Fleet-street, and rated in respect of it. He let it to Sarah Keogh at a yearly rent, and though he says she was a lodger and his servant, yet still she was his tenant from year to year. She let out the apartments, for which she paid £45 a-year to the respondent, to three gentlemen who had their offices in them as attorneys, for her own profit and advantage, and not for the profit and convenience in any respect of her landlord. Upon these facts it is contended on the part of the objector, that although the respondent was subject to rent for the entire premises as the landlord, yet that he was only the occupier of a counting-house in them, and was not entitled to stand on the burgess roll as occupier of the entire premises. On the other side it is contended, that the respondent had actual occupation of the counting-house, and constructive occupation of the entire house.

It appears to me manifest, both on principle and on authority, that the decision of the assessors upon the first question was right. The respondent was not a resident landlord. He never was a resident in the house in the large sense of the term, namely, by living in it himself, or by members of his family or his servants residing in it. He was in actual occupation of only two rooms of the house,

having parted with the legal possession of the rest to Sarah Keogh. I can see no difficulty, under the 30th section of the Act, in considering the parties to whom the remainder of the house was let by Sarah Keogh as occupiers (assuming their holdings to be of the necessary value, and that they had a right of access to them by either a common entrance or separate entrances) entitled to register. The charge of the key of the outer door was manifestly for the advantage of all the parties, both landlord and lodgers. What is a house? Is it not a place to live in? Under the 30th section of the Act, I have no doubt whatever that the word "house," used in a large sense, means a dwelling-house in which a man resides either actually or constructively. If a man's family reside in a house, he thereby occupies it; but his occupation of a shop or storehouse is but a species of accommodation. Such places are never denominated houses. A man may be rated for an entire house and have a servant taking care of it for him; but it has never been held that he was the occupier of the house because he was merely the possessor of it. Some light is thrown upon this by the 6 & 7 Vic. c. 92, s. 4; and I may observe that the rate itself had two distinct columns, one for the case of an occupier, and the other for the case of the lessee, and both are subject to be rated. The franchise is not, however, given to the lessor whatever may be the value of the house, in that character, for while the right of occupier is tested by residence, that of the lessor is tested by title. Another circumstance noticed in the same section of the Act of Parliament is to be adverted to. It provides for the case of any lodger having a lodging in the house of a lessor of sufficient value, and he has a right to go and subject himself to the rate, and he may become entitled to the municipal franchise.

The respondent's case must be rested upon the constructive occupation of the premises, for it is not pretended that he is in actual occupation. Now, constructive occupation is a question of law as well as of fact; actual occupancy is a fact, but the character of occupancy is a question of law. The respondent has sworn that Sarah Keogh and those to whom she has sublet are all mere lodgers, and that she is his servant. There is a great distinction between

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But residence is necessary to the character of constructive occupation. His occupation of a part, not to reside in, but a counting-house, can make no difference; his occupation in such cases is not the occupation of a house, but the occupation of a counting-house—an occupation which, though exclusive, is of a different character, and does not require residence to make occupation. There is not, I venture to say, an authority in the books to warrant the assertion, that without residence there can be constructively occupation of a house or part of a house. *Kearney's case* has been relied on. There the lodger was allowed the franchise, the landlord being non-resident. In *Duigenan's case* the landlord was allowed to register, though he had lodgers, because he was resident. In *Pludier's case* the resident householder, though having lodgers, was allowed the franchise; and Lord Hardwicke says:—"No man can be an occupier of a house but either by living in one of his own, or in one that he hires; and a lodger was never considered an occupier of a house." In *The King v. Ditchet* it was held that, in order to occupy, a person must be personally resident by himself or his family. Against all these authorities is the affidavit of Reynolds, swearing to a constructive occupation by his servant and lodgers. That may be his belief and opinion—that is, his inference and deduction from the facts proved; but we can pay no attention to it. He had a servant in the house, but not a domestic servant—a servant who was his yearly tenant, and upon whom he could distrain; and the lodgers

were not his lodgers, they were the lodgers of Sarah Keogh, his tenant, with whom he had no privity whatever. I therefore think the assessors decided this point rightly, and that Reynolds was not the occupier of the entire house.

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There only remains one matter more, as to the construction of the 33rd section of the Municipal Act. That applies plainly to the cases of substitution; it supposes an existing rate, by which the occupied premises are rated; it does not go beyond that; the guardians could not act upon the claim, it would affect the whole rate; but a remedy is provided by a new valuation and rating. For these reasons I am of opinion this motion must be complied with.

BLACKBURN, C. J.

I do not think it necessary to observe in any detail on the points in which my learned Brethren have concurred in opinion; for, agreeing with them, it is not in my power to add to the reasons which they have so fully and ably stated; it is therefore sufficient for me to say that I think the first ground of the objection to the claimant's right to have his name retained on the burgess roll is not tenable; and that if the second ground of objection be valid, as I think it is, it is in my opinion not obviated or removed by the notice which the claimant relies on, the facts not bringing this case within the operation of the 33rd section of 3 & 4 Vic. c. 108.

The only question therefore which I feel it right to discuss is that which has been occasioned by the letting to Sarah Keogh, and her occupation of a part of the premises, for which the claimant has been rated to the relief of the poor for the year ending the 31st of August 1849.

Occupation of the rated premises being essential to the establishment of the claimant's right, he contends that he did occupy; for that the occupation of Sarah Keogh was that of an occupation by her, as his lodger or servant. If her occupation can be referred to either of these characters, his claim cannot be denied.

The facts upon which the question is to be discussed are disclosed in his affidavit. The claimant, it is observable, does not state whether the letting was by deed or writing, nor does he

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profess to set forth its very terms. He has therefore devolved on us the duty of considering what was the nature and substance of the contract with Sarah Keogh; to a certain extent this admits of no doubt. She was to pay him an annual rent; she was tenant for a year certain; she had a right to let the premises as she pleased in her own name, and for her own exclusive benefit; the rents at which she should let the premises were of necessity to be hers, and could only be sued or distrained for by her, and the tenants were to hold directly from her without any privity with Reynolds. I need not say that the acts of Sarah Keogh were in accordance with, and in execution of, the rights she so acquired. She dealt with the possession for her own absolute use, and on her own behalf. On this statement of her rights and facts no doubt could exist that she was both tenant and occupier of the premises let to her; nor is any doubt cast on this by the assertion that the premises were let to her as a lodger, and that she occupied as his servant, he having dominion over the outer door.

In this, as in any case where the actual terms of a contract are not set forth, where we are called on to say what the rights and liabilities of the parties to it are, we should ascertain and abide by such a construction of it as will secure to both parties the real objects they dealt for. When the question is, whether Sarah Keogh was a tenant, or a lodger, or a servant, the claimant, who could have done so, should and ought to have stated the words of the contract. Suppressing them, he has no right to ask us to adopt his construction of it, and by his assertion, as if a matter of fact, to decide the question of law, which is the subject-matter of investigation. Upon the uncontroverted facts Sarah Keogh was tenant of a portion of the premises, and this she occupied by her lodgers. Could she be said to occupy as his servant the premises which she so let? It seems to me impossible to entertain such a proposition. The respondent might be warranted in saying she was his servant, for so she was, having in that capacity the care of part of the premises, which Reynolds retained for his own use. But even as to the keys of the outer doors, though she had the charge of them, it was not for the exclusive or absolute use of her master, but for the use, security and

accommodation of herself and her tenants ; and she would have had no more a right at the command of the respondent to exclude her tenants by locking the door, than he would himself to exclude her and them by his building it up.

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Now, let us consider whether, without an utter abuse of language, he can be heard to say that in relation to the premises let to her, she was a lodger. A lodger is one who lives in a room or rooms hired in the house of another. The word plainly signifies a hiring or renting for the personal use and accommodation of the party and his family. He and they are to become inmates of the apartment ; it is to become their habitation and place of abode. Can we on the evidence before us say that she, a menial servant, took these rooms to inhabit them herself ? The very contrary is the fact. She could not have paid the rent for them but by sub-letting them, as she did, and as the claimant must have known she would be obliged to do ; in fact, he let them to her that she might deal with them as her own property, not with the idea that she was to occupy them herself as a lodger, but to manage and dispose of them to others both for her own profit, and to enable her to pay him the yearly rent of £45. All this tends, in my opinion, to support and confirm the character of the contract as amounting to a simple demise, and to negative and repel the idea that she was to be herself an occupier or lodger in any sense of the word, of the apartments which she was to sub-let, and did sub-let.

As bearing on this question, let us now consider the value of the assertion, that the claimant had full dominion over the outer door. In one passage of his affidavit he says this was absolute ; in another he qualifies it by adding, save as to lodgers. I cannot see how this tends to show that Sarah Keogh was a lodger. Whether tenant or lodger, it is plainly repugnant to the nature of his letting to her that he could have had the exclusive or any use of the door, or any power over it, and it is not compatible with the rights which his own contract had regularly conferred on her and her tenants. It is obviously for this reason, and to avoid this difficulty, that in the second passage of his affidavit he qualifies his previous assertion, and says that none of the sub-tenants had dominion over the outer

H. T. 1851. door save as lodgers. And it is not a little remarkable that these
Queen's Bench very persons are in another part of his affidavit called *his* lodgers,
 WAUCHOB for which assertion, as matter of law, there is no pretext whatever.
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 REYNOLDS. For these reasons I cannot admit that the arbitrary use of the
 word "lodger" by Reynolds casts any doubt whatever on the nature,
 character and substance of the contract made with Sarah Keogh.

The view I have taken of the relations and rights of Sarah Keogh and her tenants, derived from the letting to her, is quite sustained by the authority of *Downing, appellant, and Luckett, respondent*, to the facts of which it bears a strong resemblance. There the landlord retained a counting-house, and did not reside on the premises, but kept a servant there, who had the care and exclusive custody of the keys, and was paid for his services by having apartments for which he paid no rent. None of the parties had a key to the outer door, on which was an inside lock. The door, when occasion required, the servant was called on to unlock. The persons who rented the different counting-houses were decided to occupy them as tenants, and I cannot see any thing to distinguish this right from those of Sarah Keogh, and of the attorneys, whose apartments, were separately and exclusively occupied by them as their registered places of business. The decision in that case, that the appellant was entitled to be registered as being in the occupation, directly negatives the right of the claimant to be deemed the occupier of the apartments occupied by the attorneys. I may here add, that I see no reason why a person in the condition of Sarah Keogh should not entitle herself to be rated, and to acquire a right to be put on the burgess roll. Such a right is recognised by the 33rd section of the Municipal Corporation Act, and by 6 & 7 Vic. c. 92, s. 4. The process to effect this must be by a subdivision and new valuation of the house in the manner prescribed by the 66th section of the Poor-law Act.

I have on every account to express my regret for the absence of my Brother MOORE, occasioned by his indisposition, but he authorises me to say that he concurs in the opinion expressed by my Brother CRAMPTON and myself as to the effect of the letting to Sarah Keogh, and that he concurs with us and my Brother PERRIN

on the other points of the case. The order therefore is, that the name of the respondent be erased by the Town-clerk from the burgess roll.

Conditional order absolute.

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 JOHN REYNOLDS.

E. T. 1850.
 April 25.

IN Easter Term 1850, *Brewster* applied for a peremptory mandamus, directed to the Council of the borough of Dublin, to proceed within ten days to elect a Lord Mayor.

A peremptory order for a mandamus will not be granted without notice to the opposite party; nor in a case where the prosecutor has lain by for a long period.

The name of Reynolds having been struck off the list of burgesses, the office of Lord Mayor, to which he had been elected, is now vacant. A question may be raised as to the jurisdiction of this Court to make this order, as it may be contended that in such a case a *quo warranto* is the proper course to be adopted; but the proceeding which has been already pursued was similar to a proceeding by *quo warranto*, and the Court having adjudicated that Reynolds' name ought not to be on the burgess roll, and as no person can be Lord Mayor except he be on the burgess roll, his election to that office therefore was a mere nullity. This is not the case of a subsequent disqualification. In this case a *quo warranto* would be nugatory; for it would be merely to adjudicate upon what has been already adjudicated upon: *Regina v. Pippen and Ricketts* (a), and there being no appeal from the decision of this Court, as its former decision could not be questioned in any collateral proceedings, we are precisely in the same position therefore as if we had obtained a *quo warranto*: *Regina v. Pembroke* (b); *Regina v. Leeds* (c).

(a) 7 A. & E. 966.

(b) 8 D. P. C. 302.

(c) 11 A. & E. 512.

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Per Curiam.

We cannot grant a peremptory mandamus in this case, no notice having been served on the opposite party; and as the prosecutor has lain by for so long a period, we will only give a conditional order for a mandamus.

It is ordered by the Court that a writ of mandamus do issue, directed to the Town-council of the borough of Dublin, commanding them to proceed to the election of a Lord Mayor of the borough of Dublin, pursuant to the statutes in that case made and provided, unless cause, &c.

May 3, 4, 27.

A having been elected a Town-councillor and Lord Mayor of the borough of D, his name was, after he had been so elected, erased by order of this Court from the burgess list of the borough of D as not being entitled to remain on the roll. *Held*, a mandamus was the proper mode of proceeding to try the right of A to the office of Lord Mayor, and that the Court would not adopt the circuitous course of proceeding by *quo warranto*, the office being void.—[*PERRIN, J., dissentiente.*]

MARTLEY, on behalf of Reynolds, showed cause against this conditional order.

J. D. Fitzgerald and Sir *C. O'Loughlen* appeared on the part of the Corporation, and—

Brewster, Napier and *Dix*, for the prosecutor.

The following authorities were relied on:— 2 *Sel. N. P.*, p. 1097; *Rex v. Bankes* (a); *Regina v. Phippen* (b); *Rex v. Winchester* (c); *Regina v. Derby* (d); *Regina v. Leeds* (e); *Regina v. Corporation of Pembroke* (f); *Regina v. Leeds* (g); *Rex v. Mayor of*

[*Semble*, the proceeding given by the 3 & 4 *Vic. c. 108*, by appeal, to have a party's name erased from the burgess roll as being disentitled to be thereon, is substituted for a *quo warranto*, and an order of the Court, erasing a party's name from the burgess roll, has a retrospective effect, and renders the office void *ab initio*.

(a) 1 Wm. Bl. 445, 452. (b) 7 A. & E. 966; S. C. 3 N. & P. 151.

(c) 7 A. & E. 215; S. C. 2 N. & P. 274. (d) 7 A. & E. 419.

(e) Ibid, 963.

(f) 8 D. P. C. 802.

(g) 11 A. & E. 512.

Cambridge (a); *Case of the Borough of Bassing* (b); *Rex v. H. T. 1851.*
Newsham (c); *The Queen v. The Overseers of the Poor of Oldham* ^{Queen's Bench}
Union (d); *Conway v. Baxter* (e); *Regina v. Cowen* (f); *Rex v. THE QUEEN*
Bridgewater (g); *Tapping on Mandamus*, p. 166; *Wilcox on Cor-* ^{v.}
porations, p. 361; *Rex v. Smith* (h); *Rex v. St. Katherine's Dock*
Company (i); *Rex v. Hereford* (k); *Rex v. Abingdon* (l); *Regina v.*
Stamford (m); *Rex v. Justices of Leicester* (n); *Rex v. Corpora-*
tion of Eye (o); *Greathead v. Bromley* (p).

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Cur. ad. vult.

MOORE, J.

May 27.

This case comes before the Court on cause shown against a conditional order for a mandamus, directed to the Town-council of the borough of Dublin, commanding them to proceed to elect a Lord Mayor. The question which the Court has to decide is, whether this order should be made absolute, and whether the mandamus should issue?

It appears that for several years, prior to the year 1849, Reynolds' name had been on the burgess roll. In that year his name appeared upon the list out of which the burgess roll was to be framed; but an objection was taken at the revision of the list to his name appearing on the roll; and that objection was overruled, and he was then declared to be duly qualified to remain on the roll.

On the 25th of November last an order was obtained from this Court, calling on Reynolds to show cause why his name should not be erased from the burgess roll; that was an order in the nature of an appeal from the Court of Revision, and upon that order the cause shown by Reynolds was disallowed, and his name was, pursuant to that order, erased from the burgess roll, and it is undisputed that

(a) 4 Bur. 2008.

(b) 2 Stra. 1008.

(c) Say. 211.

(d) 10 Q. B. 700.

(e) 7 Ir. Law Rep. 16. (f) Al. Reg. Cas. 166; S. C. 1 J. & Sy. 223.

(g) Doug. 279.

(h) 2 M. & Sel. 583.

(i) 4 B. & Ad. 360.

(k) 2 Salk. 701.

(l) Ibid. 431.

(m) 6 Q. B. 433.

(n) 4 B. & C. 891.

(o) 9 A. & E. 670.

(p) 7 T. R. 455.

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from the date of that order (29th of January) up to the present time his name has not been on the roll. During the proceedings to which I have adverted two elections have taken place—one an election of Town-council and Aldermen, and the other an election of Lord Mayor. The Town-council and Aldermen are only eligible out of those who are on the burgess roll, and it is equally clear that the Lord Mayor is only eligible out of those holding the office of Town-councillor or Alderman.

On the first election (25th November last) Reynolds was elected a Town-councillor for Merriion Ward, and on the 1st of December following, being the day appointed for holding the election of Lord Mayor, he was duly elected to that office, he being then a Town-Councillor. He having been so elected, entered on the discharge of the duties of the office of Lord Mayor, having made the declaration, and otherwise complied with the requirements of the Act of Parliament, and he has continued in discharge of the duties since. The Court of Queen's Bench having decided on the 29th of January that his name should be struck of the burgess roll, a conditional order for a mandamus was granted.

It has been argued that the office was void, and that this order had a retrospective operation; that in order to be a Councillor, a man must be on the burgess roll, and in order to be Lord Mayor, he should be a member of the Town-council, and that when the basis of all these offices was taken away, the result was, that the superstructure fell to the ground. It was therefore contended that as the legal effect and operation of the order of the 29th of January was to remove the name of Reynolds from the burgess roll, and as it never should have been on it, his election as Town Councillor and Lord Mayor fell to the ground. It was further contended on the part of the prosecution, that even if the Court was not disposed to give the order of the 29th of January a retrospective operation, the moment the order was pronounced Reynolds according to the true construction of the Act ceased to be a Town Councillor, and ceasing to be a Councillor he ceased to be Lord Mayor. On the part of Reynolds it was contended that the order of the 29th of January did not create an actual vacancy of the office; but at most made it voidable,

and that the proper way to try the question was an information of *quo warranto* and not by mandamus,

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The question for the consideration of the Court then is, whether the true course of proceeding, according to the state of the facts, was by information of *quo warranto*, or by writ of mandamus? A great number of cases have been cited, and I consider the principal of them to be, that whenever the office was full *de facto*, almost the universal course of proceeding to try the right to the office was by *quo warranto*, and not by mandamus. But I have also come to the conclusion, that though, generally speaking, a *quo warranto* is the proper proceeding for the purpose, yet there are exceptions to the rule; and that whenever it clearly appears to the Court that the office was void, and that any question of law or of fact that could be tried on *quo warranto* has been already decided by the Court, it would not adopt the circuitous proceeding of *quo warranto*, but would issue a mandamus, provided that it was perfectly clear to the mind of the Court that that was the true and proper course.

After great fluctuation of opinion during the arguments of the case, I have come to the conclusion, that on the true construction of the Acts applicable to the case, it is perfectly clear that there was no question to be decided, either of law or of fact, that had not been already decided in a proceeding to which Reynolds was a party; and that if the Court were now to grant a *quo warranto*, it would simply raise a question already decided. It therefore would be altogether a circuitous, idle and unnecessary proceeding to grant a *quo warranto* to procure ouster of an office which the Court had already decided to be void.

The 83rd section of 3 & 4 Vic. c. 108, directs that the Council of the borough should on the 1st of December elect out of the Council a fit and proper person to be Lord Mayor for the ensuing year; and that in the case of a vacancy arising by reason of his declining to accept the office, or dying, or ceasing to hold the office, as afterwards provided for, the Council should elect a new member to hold the office. By that section it provides for a possible case, namely, a party elected refusing to accept the office, or in case of his death. With regard to either of these two events, there could be no doubt

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or difficulty; and it would be the duty of the Council, within ten days, to proceed to hold a new election. It also directs them to hold a new election in another event, which was that of the party elected ceasing to hold the office; and certainly if there was nothing to explain what was the meaning of "ceasing to hold the office," there would be great difficulty in determining what was the position of the party. But that difficulty is removed by the 88th section, because that provides for several events upon which a party might cease to hold the office, such as becoming a bankrupt, taking the benefit of the Insolvent Act, compounding with his creditors, or being absent for a certain time; and then it enacts that such person should immediately be disqualified. It then provides a machinery as to what was to be done upon the occurrence of any of these events; and that was that the Council should declare the office to be void, and should signify the same by notice in writing.

Now, the 83rd and 88th sections are to be taken together. If the party refused to accept the office, or if he died, there was to be an immediate election. If he ceased to hold the office by any one of the modes pointed out by the 88th section, there was to be a proceeding taken by the Town-council declaring the office to be void. It is to be observed, with regard to the 88th section, that the disqualifications there mentioned were applicable not only to the office of Lord Mayor, but also to the office of Council or Alderman, and that whatever would disqualify for the one office would equally disqualify for the other. It is plain that the event which has happened in this case—namely, the name of the party being erased from the burgess roll, is not a ground of disqualification coming within the 88th section; and I think if the question rested exclusively on the construction of this Act, that the present case would not have been one which came within the 83rd or 88th section; and I would not be inclined to give the order of the 29th of January a retrospective operation, so as to make void the election that took place of Councillor and Mayor, and which, in my judgment, were valid at the time they were made.

However, since that Act of Parliament another Act has passed, the 6 & 7 Vic. c. 93. By the 5th section of that Act an alteration

was made in the day for holding the election ; and it also contained this clause—that in case the person so elected should decline to accept the office, or having agreed to accept it, should after such election die, or become incapable of discharging the duties of it, or cease to be an Alderman or Councillor, the Council should, within ten days after, elect another member of the Council to the office of Mayor. By the operation of this 5th section two grounds of disqualification are introduced, not provided for by the former Act:—the one, incapacity to discharge the duties of the office, which might be sickness, insanity, idiocy, or any such causes ; and the other new ingredient of disqualification was, “ceasing to be an Alderman or Councillor of the borough.”

It is plain that the disqualifications introduced into the 5th section were intended to operate, whether they occurred antecedent to or after the acceptance of the office of Lord Mayor, for the election was to be for the ensuing year, or the residue thereof ; clearly contemplating events which might happen after the election and after the acceptance of the office. I think the Court are bound to give effect to these disqualifications, introduced for the first time into an Act of Parliament. It is plain they are not disqualifications coming within either section of the former Act, and that the Legislature, in passing that, contemplated that there might be an event in reference to which a party might cease to be an Alderman or Councillor, which *per se* did not affect his office of Mayor.

In order to see whether there might be any event in which a man might cease to be a Councillor or Alderman, I must go back to the 3 & 4 Vic. c. 108. The 58th section of that Act provides, among other things, that no person should be qualified to be elected a Councillor or Alderman who should not be upon the burgess list of the borough. In my judgment this section provides for two cases of being eligible to the office, which is by being on the borough list, and also being on the list duly qualified ; and that was the more plain, because the concluding portion of the section provided that acceptance of office derived under the Corporation should be a disqualification, showing that it related to something that might occur after the party had been elected to the office of Councillor.

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H. T. 1851. If I am right in this view of the 58th section, the result was, that the moment Reynolds was struck off the burgess roll he was disqualified to be, or to hold the office of, Councillor or Alderman ; and if the legal effect of the 58th section was to make him cease to be a Councillor or Alderman, the case then came directly within the 5th section of the 6 & 7 Vic. c. 93, declaring that in case a man who had been elected Lord Mayor ceased to be an Alderman or Councillor, he should cease to be Lord Mayor.

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I have stated that the ordinary course of proceeding, where the office was filled *de facto*, and where it was filled *de jure* up to a particular time, was by *quo warranto*. If a writ of *quo warranto* had issued in this case to ascertain by what authority Reynolds filled the office of Councillor, the question of law to be decided would be, whether he was or was not on the burgess roll? and the question of law would be, whether being once on it, he had been legally removed from it? These questions have been already raised in the present case. The appeal given by the Municipal Act to the Court of Queen's Bench, from the decision of the Revision Court, was tantamount to a *quo warranto*; and accordingly the Court has decided—first, that his name should be erased from the burgess roll, and it has been erased; and secondly, that it has been properly erased, and that he has no authority to be on the roll. It appears therefore that a *quo warranto* to raise questions which have already been raised, and conclusively decided against Reynolds, would be contrary to principle; and therefore if there were no questions to be decided, and if the Court had judicial knowledge of the decision as to law and fact, it appears to me that this case constituted a perfectly clear exception from the ordinary rule, and that a *quo warranto* was the proper mode of proceeding.

I therefore have come to the conclusion that Reynolds' name having been erased from the burgess roll, he ceased under the 58th section to hold the office of Councillor; and that when he ceased to be a Councillor, he ceased under the 6 & 7 Vic. to be Lord Mayor; and the Council were then bound to proceed to a new election. The Council having neglected to do so, it becomes the duty of the Court to issue a mandamus commanding them to elect a Lord

Mayor. I therefore think that the cause shown should be disallowed, and that a mandamus ought to issue.

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PERRIN, J.

I am of opinion that Reynolds, being on the burgess roll, was qualified and eligible to be elected to the office of Councillor, and that he was duly elected thereto; and being a Councillor, that he was qualified to be elected, and eligible to the office of Lord Mayor, and had been duly elected to it. Those who called it a colorable election, or an election conveying no title at the time, used language which I do not understand. I understand a colorable election to be such a one as in *The Cambridge case*, where an officer, who was on board a transport ship on his way to Canada, was elected; but the election of a man who was present, and opposed by another candidate, and who was elected by a majority of votes, who made the usual declaration, was sworn in, entered into office, and sat at the Commission with the Queen's Judges as Lord Mayor of Dublin without the possibility of objection at that time—that such an election could be called a colorable one, I certainly cannot understand.

When this motion was first brought forward, it was pressed on the ground that the order striking Reynolds' name off the burgess roll had a retrospective effect, and annulled every thing that had previously taken place. I concur in the view taken by my Brother MOORE on that subject. But if the validity of the election was to be questioned, it is not enough to say that a mandamus is not the way to try the question; the constitutional mode of trying it is by *quo warranto*, when the party would not only be heard by Counsel, but would have the further advantage of having a writ of error, which I consider of inestimable importance.

I quite concur in the construction of the 58th section, that it should be a continuing qualification; but then it has been assumed that thereupon he might be removed, because there is nothing further to try. The statute does not enact that on the loss of the qualification the office shall become void, but that no person should be qualified to become a Councillor whose name was not upon the burgess list. It provides, that within a certain time after a vacancy the Council

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 REYNOLDS. shall proceed to hold a new election ; but the question is, what constitutes a vacancy ? Is it the fact of disqualification ? or is it a vacancy by resignation, or a vacancy by the declaration of the Council, or a vacancy by the order of the Court ? If the order made by the Court, when the matter was first brought before it, went on to state that Reynolds should be struck off the roll and cease to be a Councillor, and thereby cease to be Lord Mayor, and that the office of Lord Mayor was thereby vacant, then a vacancy would have existed. But it is remarkable that in the very order for this mandamus the words are to command the Town-council to proceed to the election of a Lord Mayor pursuant to the statutes in this case made and provided. The writ does not state that the office was vacant.

I shall now refer to these clauses of the Act which I agree with my Brother MOORE in thinking should be read together. The 88th section provides that in certain cases such person should immediately become disqualified, and should cease to hold the office of Mayor, Alderman, or Councillor. But did the office thereby become vacant upon the fact of disqualification ? No such thing. The section says :—“ And the Council or Board shall forthwith declare the office to be void, and signify the same by a notice signed in a particular way, and fixed in a particular place within the borough, and the said office shall thereupon become void.” This statute does not leave it a matter of doubt for some portion of the burgesses to say the office was become void, and that therefore there was a vacancy and the election should be held ; but the statute provides a domestic tribunal to ascertain the fact and to declare the result. One of the clauses said, that in case the Lord Mayor should be absent for more than two months, &c., he should thereupon become disqualified and should cease to hold office ; but then there was a further proceeding necessary—namely, the declaration of the Council, in order to make the office void.

This may be said to be beside the merits of the case ; but are we to put in motion this writ of mandamus, unless it is perfectly plain there was an existing vacancy ? The 83d section says that on the 1st of November the Council should elect a Lord Mayor, who should

continue in office for a whole year, and until his successor should have accepted office; and that in case a vacancy should be occasioned in the office during such year by reason of the person elected to such office not accepting the same, or by reason of his dying or ceasing to hold office, the Council should within ten days, not after he should cease to hold office, or should not accept it, but after such vacancy had occurred, proceed to the election of another person. Reading those two sections together, is it not reasonable to suppose that the vacancy was to be declared in some way? I read both together, and the fair construction which I put upon the two sections together suggests this to be their meaning—that the Lord Mayor should be elected from the Council—that he should be chosen on the 1st of December—that he should come into office on the 1st of January following—that he might become disqualified in the interim; and according to the spirit of the Act he ought not to become Lord Mayor; and therefore they provide that if any of those matters referred to should occur he should cease to be Lord Mayor.

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I do not think that the 5th section of 6 & 7 Vic. c. 93, was intended to render the continuance of the office requisite to the qualification. I rather understand it as supposing a case not before provided for. It does not mean on ceasing to be a Town-councillor he necessarily ceased to be Lord Mayor. In considering these Acts of Parliament, the Court ought not to consider them with the same strictness of attention to phraseology as they considered older Acts. If the party were entitled to a mandamus, it should be a mandamus to pursue the provisions of the Act. I think we ought not to grant this mandamus—a proceeding from which Reynolds has no right of appeal, and that the course that should have been adopted to determine whether the office of Lord Mayor was void or full, was by *quo warranto*.

CRAMPTON, J.

I am clearly of opinion that this mandamus should issue. The Council of the Borough of Dublin are at this moment without a rightful head. There is a Lord Mayor *de facto*, but not *de jure*,

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Queen's Bench speedily as possible.

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It is admitted by the defendant's Counsel that Reynolds only filled the office as Lord Mayor *de facto*; but the argument is, that he is removeable from the office only by an information in the nature of a *quo warranto*. In my opinion an information of *quo warranto* is not applicable to the case, and that a writ of mandamus is the only and proper course that could be taken under the circumstances. This is not a dispute between two persons claiming the same place, but between the public and the party holding office. In the former case the writ is discretionary; in the latter it is a suit as a matter of right, where no doubt exists as to the title. When, however, there is no question to be tried, a mandamus is the proper course to ascertain whether an office is actually vacant or illegally occupied; but where a question of title between contending parties, or a question of right, remains to be tried, there should be a *quo warranto* in the first instance. That is the doctrine of all the text-writers on the subject, and this distinction reconciles all the cases. In *Com. Dig. Mandamus*, it is said to be a proceeding granted to prevent a failure of justice.

With respect to the nature and character of the order of the 29th of January, I would say it was a final adjudication both upon the law and the facts. The Court thereby decided that Reynolds was not entitled to be on the burgess roll. Now, by the Municipal Act this summary proceeding by appeal was deliberately substituted for the expensive and circuitous proceeding by *quo warranto*; it was in fact a species of statutable *quo warranto*. This was not only done to save expense and delay generally, but because the office was an annual office, and a proceeding by *quo warranto* would have been futile and absurd. It appears therefore that the result of that order was exactly the same as it would have been if a *quo warranto* had issued to try the same question. The remedy by appeal is open only to a burgess, but that by *quo warranto* is open to every one. If the defendant had succeeded on the appeal, his title as a burgess could not be questioned by *quo warranto*.

Now, by the 58th section of the Municipal Act no man could be

a Councillor whose name was not on the roll. It is manifest therefore that in point of law his name was not on the burgess roll on the 26th of November, though in point of fact it remained there until the 29th of January. In my opinion the effect of the order of the Court was as if his name had never been on the roll at all. Upon this view of the case the legal consequences are these:—either Reynolds never was in contemplation of law a burgess, and therefore his election as Councillor was void, and he ceased to be Lord Mayor, or that he ceased to be a burgess in November, when the rule nisi was pronounced, and therefore could not legally be elected as Councillor; or lastly, that when the conditional order was made absolute he ceased to be a burgess, and under the Municipal Act the Council were bound to proceed to a new election of a Lord Mayor. The Council having neglected to perform their duty, the Court is bound to issue a mandamus directing them to do so. I think the Court have no discretion to exercise in this case, and that we are bound to issue this mandamus.

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BLACKBURN, C. J.

I am of opinion that the cause shown against this conditional order should be allowed, and that we are bound to award the mandamus required by the applicant.

After the elaborate and able arguments of my learned Brethren, I should waste the public time if I entered upon any lengthened discussion of this subject. I do, however, think it necessary, in a few words, to state the precise grounds of my opinion. Whether the order of this Court, pronounced on the appeal on the 29th of January last, in pursuance of which Reynolds' name was expunged from the burgess roll, had any retrospective effect, it is unnecessary to consider or decide; but that order was made against the right of Reynolds in a proceeding against him, and after a full and deliberate consideration of the merits of the case, the immediate and necessary effect of that order, according to the terms of the 58th section of 3 & 4 Vic. c. 108, was, that Reynolds ceased to be qualified to be, that is to continue, a Councillor, and having ceased to be a Councillor, necessarily ceased to be Lord

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 thereafter to have elected a Lord Mayor in his place pursuant
 THE QUEEN to the express terms of the 6 & 7 Vic. c. 93, s. 5. The 58th
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 be elected, or to be, that is to continue, a Councillor, whose name
 shall not be on the burgess roll; and the qualification of being a
 Councillor is not only requisite to make a person eligible as Lord
 Mayor, but, by the 5th section of the latter Act, he must continue to
 be a Councillor to enable him to continue to be Lord Mayor.

If it is plain, as in my opinion it is, that a mandamus would be
 the proper course, had Reynolds' name not been on the roll when he
 was elected, I can see no difference, as far as regards the mode of
 proceeding, between such a case and the present, in which, by matter
ex post facto, it is conclusively established by this Court, having
 competent jurisdiction, he being a party and bound by its decision,
 that he ceased to be a Councillor, and therefore ceased to have
 the qualification essential to enable him to hold the office of Mayor
 any longer. This opinion I entertain without any doubt whatever,
 save that which arises from the sincere respect I hold for that of my
 Brother PERRIN, from whom I have the misfortune to differ.

Order absolute.

T. T. 1850.
 June 11, 12.

A burgess was elected Lord Mayor of the borough of D., and by order of this Court his name was expunged from the burgess roll, and a mandamus issued to the Council of the borough to elect a person in his room; thereupon a return was made to the writ, which stated his election to and continuance in the office of Lord Mayor, and that the office was full, and that his election was not set aside, annulled or avoided. *Held*, that this Court had jurisdiction to quash this return, but that it was not a fit case in which the discretionary power of the Court should be exercised, the return not being frivolous.

Held, on demurrer, that this return was bad.

and reciting also the sections prescribing the mode of election of the corporate officers, and that no person should be thereunto elected who should not be on the burgess list, and the time of holding the election of Lord Mayor, and that the Act had come into operation in the city of Dublin on the 10th of April 1841. It then recited the sections of 6 & 7 Vic. c. 93, which altered the times of the election and commencement of the office of Mayor, Aldermen and Councilors, and which required the Council of the borough, in the event of the Lord Mayor ceasing to be an Alderman or Councillor, to elect a successor within ten days.

It further recited that John Reynolds, by the name and description of John Reynolds of No. 10 Fleet-street, was returned in the Town-clerk's list, by him signed on or before the 20th of September 1849, which list was delivered by the Town-clerk to the Lord Mayor for revision; that a notice of objection to his name being retained on the roll was duly served on the Town-clerk and on Reynolds, and that this objection was disallowed by the Court of Revision, and the burgess roll so revised was completed on or before the 20th of November 1849.

The writ then recited that the prosecutor, on the 31st of November 1849, appealed to the Court of Queen's Bench against Reynolds' name being retained; that the Court granted a conditional order for its erasure from the roll on the ground of his not being qualified by law to be a burgess; that after such order Reynolds, assuming and pretending that he had been duly elected Councillor on the 21st of November, had afterwards been duly elected to be Lord Mayor for the year commencing the 1st of January 1850, on which day he took the office and entered on its duties, and used and exercised the said office, and claimed to be Lord Mayor without any legal right or authority.

The writ further recited the order of the 29th of January 1850; that in pursuance of that order Reynolds' name was erased from the burgess roll, whereby he became and was disqualified to be a Councillor or Alderman of the borough, and became and still was incapable of filling the office of Lord Mayor; that thereupon it became the duty of the Council, within ten days after the 29th of

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H. T. 1851. January 1850, to have elected a fit person to be Lord Mayor for the residue of the year in his place and stead; that the Council did not so elect, and that no person had been duly elected, to the hindrance and obstruction of public justice within the borough and government thereof.

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The mandate of the writ was, that the Council should, on the 7th day of June next, at the hour of eleven o'clock, at the Assembly-rooms of the said borough, or some other convenient place, proceed to the election of a Lord Mayor for the residue of one whole year from the 1st of January then last past, according to the statutes in that behalf, and to do all necessary acts in order to such election, and to admit the person so elected as aforesaid into the office of Lord Mayor, together with all the liberties, privileges and franchises to the said office belonging and appertaining, pursuant to the statutes, &c., or else show good cause, &c.

To this writ the Council returned (protesting they were not bound to answer it, and that it was improperly directed, and should have been to "The Lord Mayor, Aldermen and Burgesses of Dublin"), that it was their duty to elect on the 1st of December in each year, but at no other time (save in the case of a vacancy during the year of office), out of the Aldermen, &c., a fit and proper person to be Lord Mayor, &c.; that on the 1st of December the Council did proceed to do so; that John Reynolds, on the 26th of November 1849, being duly qualified in that behalf, was duly elected a Councillor; that he accepted said office, and made and subscribed the declaration required by law of his qualification for the said office; that he entered on the duties, and was enrolled on the Council roll; that on the 1st of December 1849, being such Councillor, they did then and there elect him to the office of Lord Mayor, being so qualified; that he accepted the office, and before he acted, on the 1st of January 1850, before the outgoing Lord Mayor and an Alderman of the said borough, being two of the members of the Council, he made and subscribed the declaration subscribed [setting it out]. That after making the said declaration he entered upon the said office, and then and there became and was the Lord Mayor for the year 1850; that it was not true that he took the office without legal authority; that

he hath used, and still doeth use, the office of Councillor, and that he has never been removed or divested from the office ; that his name was still on the Council roll, and that as such Councillor he became and was and is capable of holding and filling the office of Lord Mayor ; and that from the 1st of January last, when he entered on the office, no vacancy has arisen or been occasioned in the office within the meaning of the statute ; nor have the Town-council declared it to be void, nor by notice in writing (as prescribed by the Act) signified that it has so become void, nor that Reynolds has died or become incapable of discharging the duties, nor had resigned the office, nor become bankrupt or insolvent, nor compounded by deed with his creditors, nor had he been absent from the borough for more than two calendar months since he was Lord Mayor, nor had any application been made or granted to the Court of Queen's Bench calling on Reynolds to show by what warrant he claimed to exercise the office of Lord Mayor ; nor had he been divested or deprived of the office by the judgment of the same or of any other Court ; that it was not true that on the 29th of January last Reynolds became and was incapable of holding and filling the office, or that it was the duty of the Council to proceed to an election in his room. Wherefore for the several causes, and inasmuch as the said office is full and not vacated, nor the election hereinbefore mentioned set aside, annulled or avoided, the said Council, &c., have not proceeded, and cannot, and ought not to proceed, to the election of a Lord Mayor for the residue, &c. So answer the Council of the borough of Dublin to the annexed writ.

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Signed on behalf of said Council pursuant to their order to that effect made at an assembly of said Council, duly assembled on that behalf.

WILLIAM FORDE, Town-clerk.

And underneath—

"I certify that at a meeting of the borough of Dublin, in that behalf duly assembled, the above return was directed by the said Council to be made to the annexed writ.

"JOHN REYNOLDS,

"Lord Mayor of the Borough of Dublin."

H. T. 1851. *Brewster* (with him *D. Lynch* and *Dix*) now moved to quash the document under the corporate seal of the Right Hon. the Lord Mayor, Aldermen and Burgesses of Dublin, purporting to be the return to the writ of mandamus issued in this cause, on the ground that the same was not the return of the body to whom the writ was directed, and who were bound to make a proper return thereto; and further, that supposing the same to be the proper body, the return was insufficient in law, inasmuch as it did not traverse or deny any of the material matters set forth in the writ of mandamus, but was trifling, and filed for the purpose of delay.

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Sir *C. O'Loghlen* (with him *J. D. Fitzgerald*), contra, objected that the motion was of a twofold character; that in fact it was for a peremptory mandamus, which application could not be made within the last four days of Term: *The King v. Clendenning* (a).

Brewster.

There is no rule of that sort applicable to a motion for the quashing of a return, though of course an order for a mandamus cannot be granted within the last four days.—[MOORE, J. It is difficult to say that this is not an application for a mandamus. I have known this objection made in criminal informations as to showing cause within the last four days.—CRAMPTON, J., referred to *Evatt and others v. Kelly* (b). There that strict rule was relaxed, and a motion for a criminal information was made within the last four days of the Term.]

BLACKBURNE, C. J.—We will hear the motion.

For the motion were cited, in addition to the authorities relied on in the previous argument, *Rex v. The Mayor of Norwich* (c); 3 & 4 Vic. c. 108, s. 83; 6 & 7 Vic. c. 93, s. 5; *Com. Dig.* tit. *Mandamus*, C; 2 *Gude's Crown Practice*, p. 512; *The King v. Wix* (d).

(a) 1 H. & B. 36.

(b) 1 J. & S. 28.

(c) 1 Stra. 55.

(d) 2 B. & Ad. 197.

Against the motion—3 & 4 Vic. c. 108, s. 57; *The Queen v. Ledgard* (a); *Regina v. Twitty* (b); *Grady & Scot. Prac., Cro. Office*, p. 497; *The King v. Bishop of Oxford* (c).

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In this case an application has been made on the part of the prosecutor to quash the return to the mandamus which had issued to the Town-council of Dublin to elect a Lord Mayor. On the part of the prosecutor it was contended that the return was of such a frivolous character as to be in truth a contempt of the Court, and that the Court was bound on that ground to grant the application. On the part of the Corporation it was insisted that the Court has no power whatsoever, even though they should be of opinion that the return was illusory and frivolous, to set it aside, and that the Act of Parliament, which bound the prosecutor in every instance to demur to the return, had taken away the jurisdiction which ordinarily belonged to the Court by common right and by common law over its pleadings and records. Both parties have contended for too much. It is quite plain that the Court have the power referred to; the only thing to consider is whether the present was a fit case in which that discretionary power should be exercised?

It is not unimportant to observe, that as the law at present is, a demurrer to this return would not only raise a question as to the sufficiency of the return, but would raise and call upon the Court to decide a question as to whether there were valid objections to the mandamus itself; so that we are called upon by the present application not simply to set aside the return as frivolous, but to decide that the mandamus itself is free from objection, and that no valid objection—not even a debateable objection—could be made to the form of the mandamus. I have heard enough stated as to two or three particulars objected to in the mandamus to make it appear to me that they require answers, and that they give rise to questions that ought to be discussed, and I will not preclude that discussion by undertaking definitively now to decide

(a) 1 A. & E. N. S. 616.

(b) 2 Salk. 433.

(c) 7 East, 345

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that the mandamus is in point of form free altogether from objection. I do not think I have the power to do that, and assuredly I will not assume that power, where in the exercise of it the order which would be pronounced would be without appeal or power of revision; therefore if there were nothing else in the case than this, it would be in my judgment a decisive reason against exercising that summary power.

But now, with respect to the matter of the return itself. It is contended to be frivolous, because it is at variance with the judicial determination of the Court. It is no such thing. The state of the case when the Court had granted the order for a mandamus was this:—By virtue of an exclusive and final jurisdiction vested in that Court they decided, on the 29th of January last, that the name of John Reynolds ought not to have been put on the burgess roll, and ordered it to be expunged from the roll, and it had been accordingly removed from it. The application for a mandamus involved this question, namely—whether in the then state of the facts the proper course was to issue a mandamus, or whether the party complaining ought not to issue a *quo warranto*? The decision of the Court was, that a mandamus was the proceeding adapted to the purpose, one Member of the Court, however, thinking that a *quo warranto* was the proper course. The majority of the Court, who decided that the mandamus was the proper course of proceeding, did so because they had formed the opinion, that whether the order of the 29th of January was retrospective or not, when that order was pronounced Reynolds ceased to be a burgess, and ceased to be qualified to be Lord Mayor. That was the opinion which they entertained and the opinion which they expressed; but the decision which they pronounced was, that the mandamus should issue, which mandamus was not peremptory, but enabled the Council to state what objections there were to the election of a new officer in the place of Mr. Reynolds. Now, so far as I pronounced the opinion that the consequence of removing the name of Reynolds from the roll was that he ceased to be a Councillor, ceased to be Lord Mayor, and that the office of Lord Mayor was therefore vacant, I can say with perfect candour that it would have been to

me a source of gratification, differing as I did from a distinguished Member of the Court, that that opinion should not have been conclusive, even upon the question whether the mandamus should issue. But how much less would I be actuated by a different feeling when the very matter before the Court now was to put in course of inquiry the correctness of that opinion, and which, whatever might be my confidence in my own judgment, I consider to be a matter well deserving, and fairly a subject for, further consideration by a competent tribunal? Therefore there is not the slightest pretext for saying that the return which put in a course of inquiry the validity of that opinion—for it was not a decision—was a frivolous return; on the contrary, if I were wrong on that occasion, my opinion would be revised and corrected, and therefore on the part of the Court I altogether object to the term “frivolous,” being followed by the use of the word, “contemptuous,” which has been repeatedly urged and dwelt on in the course of the argument.

I am therefore of opinion that in the exercise of our discretion we ought not to quash this return upon motion, at the same time that we have all the power that the Court ever possessed over its own pleadings and its own proceedings.

CRAMPTON, J.

The practice of the Court in a case of this description is plain. If the return be a *bona fide* one to raise a question of law or of fact, the Court will not exercise a summary jurisdiction in relation thereto; but if the return be illusory, or one that ought not to have been filed, the Court has full power to interfere. The majority of the Court think the present return not frivolous or evasive, and I am not willing to suggest my own doubts against that opinion.

PERRIN, J., and MOORE, J., concurred with the CHIEF JUSTICE, and the motion was refused, without costs.

A demurrer was then put in to the return (the points noted in which were almost identical with those raised on the argument for the mandamus), and being set down for argument, was now heard.

H. T. 1851.
Queen's Bench

THE QUEEN
v.

REYNOLDS.

Dix and Napier, in support of the demurrer.

Sir *C. O'Loghlen* and *J. D. Fitzgerald*, contra.

Jan. 14.

BLACKBURN, C. J.

This case comes before the Court upon demurrer to the return. It is unnecessary to go into the merits of a question which has been discussed when the Court granted the order for the mandamus. Taking the allegations of the writ and the facts stated on the return, it appears that Reynolds was elected Lord Mayor on the 1st of January 1850, and by an order of this Court, pronounced on the 29th of January 1850, he was adjudicated finally to have no right to be on the burgess roll; and whether that order have reference to the time when he was elected Lord Mayor or not, it is plain that so soon as that order was pronounced it became the duty of the Council to proceed to the election of a Lord Mayor.

The Court are clearly of opinion that if there were any ambiguity in the words of the writ as to Reynolds assuming and pretending that he was duly elected, it was removed by the averment in the return, which distinctly stated the fact of his election.

CRAMPTON, J.

I consider the order of the 29th of January 1850 to be equivalent to a judgment of *quo warranto*, and that a mandamus to fill up that vacancy so created necessarily resulted from that order.

PERRIN, J.

I decline giving any opinion on the present argument.

MOORE, J., concurred with the CHIEF JUSTICE and CRAMPTON, J.

Demurrer allowed, with costs.

Vide *The Queen v. Dixon*, 15 Q. B. 33.

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Queen's Bench

SAMUEL FRAZER v. GEORGE BLAKE.

Jan. 17.

Assumpsit.—The declaration contained two special counts and the money counts.

The first count stated that in consideration that the plaintiff, at the request of the defendant, would deliver to the defendant a certain car of the plaintiff of the value of £80, in exchange for a set of harness of the defendant, the defendant promised the plaintiff to deliver to him the set of harness and to pay him a sum of money on request, to wit the sum of £10. 10s., in exchange for the said car. That plaintiff did deliver to the defendant the said car. *Breach*, that the defendant had not delivered to the plaintiff the set of harness, or paid the sum of £10. 10s.

The second count was more general than the first.

The defendant pleaded *actionem non*—because he says that after the making of the promises, and accruing of the several causes of action in the declaration mentioned, *if any such were made or accrued*, and before the exhibiting of the bill of the plaintiff, to wit on the 1st day of May 1849, the defendant became a bankrupt within the true intent and meaning of the statute then in force in that part of the United Kingdom of Great Britain and Ireland called England, and that the said supposed causes of action in the declaration mentioned, *if any such there be*, and each of them, did accrue to the plaintiff before the defendant so became a bankrupt, to wit at, &c., concluding to the country.

Special demurrer to this plea, assigning as cause that the defendant had not confessed or avoided, or traversed and denied the making of the promises and the accrual of the causes of action in the declaration, and also that he had attempted to avoid without confessing the making of the promises and the causes of action, and that the plea was pleaded to the said supposed causes of action, *if any such there be*, instead of admitting the causes of action.

Joinder in demurrer.

A plea, that the defendant became a bankrupt after the accrual of the supposed causes of action in the declaration mentioned, *if any such there be*; *Held*, bad on special demurrer, as neither avoiding or confessing the debt.—[CRAMPTON, J., dissentiente.]

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Queen's Bench

FRAZER

v.

BLAKE.

Sheekleton and Ross Moore, in support of the demurrer.

This plea is defective in substance and in form. It does not confess and avoid or traverse the making of the promise in the declaration: *Margetts v. Bays* (a); *Gould v. Lasbury* (b); *Brennan v. Monahan* (c). In that case the defendant was allowed to amend two pleas demurred to for the insertion of the words here objected to, "if any there be." The plea is not pleaded in conformity with the statute; for the statute does not contain the words "if any such there be:" *Evestaff v. Russell* (d). There a distinction was taken between the words "supposed causes of action" and the words "if any there be." Parke, B., says:—"The word 'supposed' is a sufficient admission of a cause of action; but the words 'if any' stand on a different footing, and although sufficient in a plea in abatement, they are not so in a plea in bar, because they leave it doubtful whether any debt at all ever existed."

M. Barry (with him *Napier*), contra.

An English certificate of bankruptcy duly obtained is an answer to an action in Ireland. The plea here is misunderstood. The causes of demurrer apply solely to pleas in confession and avoidance; this is not such a plea. In *Gould v. Lasbury*, as the plea was pleaded, it only discharged the defendant from those creditors who signed his schedule, and it was under 7 G. 4, c. 57, the Insolvent Act. That plea is different from the one given by the Bankrupt Act.—[BLACKBURN, C. J. Suppose issue taken, all that the defendant would have to prove would be the existence of the certificate].—MOORE, J. There is no issue joined with regard to the breach of the contract. Where would there be authority for assessing the damages sustained by breach of the special agreement?—The Bankrupt Act throws on the defendant the proof of every averment; here the plea concludes to the country, and the defendant would be required to prove all its allegations. A plea in confession and avoidance would be the contrary. In a plea of the

(a) 4 Ad. & Ell. 489; S. C. 6 N. & M. 228.

(b) 1 Cr. Mees. & Ros. 254.

(c) 4 Ir. Law Rep. 415.

(d) 10 M. & W. 365.

Statute of Limitations or insolvency, a statement of time is the essence of the plea; but here the Act of Parliament is quite general in its terms. The certificate is to be a bar "for any debt, claim, or demand whatsoever."—[PERRIN, J. But what are the words "if any such there be" inserted in the plea for?—They are but surplusage. The plea is not a plea in confession and avoidance, but a plea given by the statute, and so it concludes to the country—[MOORE, J. The defendant on that plea begins and produces evidence of his bankruptcy. Suppose he fail in that, what would the plaintiff have to prove? How can damages be assessed if there be no issue joined?]

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BLACKBURN, C. J.

The plea is evidently framed with a view to embarrass the proceedings at the trial; and the protestation it involves in the words "if any such there be" neither avoids or confesses the debt.

CRAMPTON, J.

I think there is no foundation for this demurrer. One of the cases cited is against the opinion of Lyndhurst, C. B., yielding to the judgment of the Queen's Bench, and rests on a principle I cannot understand. There is no greater difficulty in the plaintiff proving his demand on a plea of bankruptcy than on a plea of the Statute of Limitations.

PERRIN, J.

I am told the words "if any such there be" are surplusage and mean nothing. They are introduced for the sole purpose of raising questions at the trial; and the first that would be started would be, as to which party was entitled to begin.

MOORE, J.

In my judgment, the authorities cited are decisive in favour of the plaintiff.

Demurrer allowed, liberty being given to amend on the production of the certificate of bankruptcy.

H. T. 1851.
Queen's Bench

In re THE CROMMELIN ESTATE.

Jan. 17, 21.

A power to make leases for any term not exceeding three lives and forty-one years. *Held*, that a lease for three lives and forty-one years, commencing from the 1st of November preceding the day of the death of the survivor of the *cestui que vies* in the lease, was a valid lease within the meaning of such power.

THIS was a case submitted for the opinion of this Court by the Commissioners for the Sale of Incumbered Estates. The case stated that Nicholas Crommelin, by his will dated the 6th of September 1788, devised all his real estate to his brother Delacherois Crommelin for and during the term of his natural life, and from and after the decease of the said D. Crommelin he left and devised same to the first, second, third and every other such son of the said D. Crommelin lawfully to be begotten, without any regard to seniority of age or priority of birth, as the said D. Crommelin should think most worthy and deserving, and to the heirs male of their several and respective bodies, and on failure of issue male of the said D. Crommelin, remainder over as in said will mentioned; and in said will was contained a power of leasing in these words:—

“And I do hereby empower my said brother D. Crommelin and his heirs male, and the several other persons in remainder as aforesaid, and their several heirs male, when in possession of my real estates, to make leases thereof for any term not exceeding three lives and forty-one years, at the full improved rent, but without taking any fine for the making such leases.”

The said D. Crommelin, after the death of said testator, and when in possession of the real estates, by indenture of lease bearing date the 5th day of November 1801, demised part of the real estates to James Stott, his heirs, executors, administrators and assigns, from the day of the date thereof, for and during the natural lives of John Stott, Robert Stott and Isabella Stott, and the lives and life of the survivor of them, and from and immediately after the decease of the said survivor for and during the full time and term of forty-one years, commencing from the 1st day of November which should next precede the day of the death of such survivor of the three *cestui que vies* aforesaid, as far as the leasing power of the said D. Crom-

melin under his late brother's will enables him so to do, from thenceforth fully to be complete and ended.

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"The Court are requested to give their opinion as to whether the said power authorised the said D. Crommelin to grant such term of forty-one years, commencing from the 1st of November next, preceding the death of such survivor as in the said lease granted."

Pilkington and *H. Smythe*, in support of the negative.

This is a mere question of construction of the words of the power. It will be argued that where the power is negatively expressed, it is to receive a more liberal construction in favour of the lease, purporting to execute the power, than if it were expressed affirmatively; and *Whitlock's case* (a) will be relied on. We do not deny the authority of that case; but we deny the inference attempted to be deduced from it. There the term in the lease was admittedly less than the term in the power. Here the question is, is the term in the lease greater than that authorised by the power?

The question is in truth one of construction, and therefore the rules of construction are to be applied to it. First, there is no time limited by the power from which either the term of lives or of years is to commence; and the general rule in such cases is, that the term shall operate from the delivery of the deed. Why not in this case apply that rule to the term for years as well as to the term for lives? This lease operating by way of appointment, there is nothing contrary to the rules of law in the term for lives commencing after delivery of the deed; and why fix on a different *terminus a quo* as to the term of years from that fixed on for the term of lives? It is said the word "and" implies something additional to the term of lives; but surely "and" is a fitter word to express a concurrent term than the word "or," and yet it is admitted, if the term "or" were used, the term would be a concurrent term: *Long v. Rankin* (b); *Commons v. Marshall* (c). If therefore the words "three lives and forty-one years" are not inconsistent with a term for three lives with forty-one years concurrent, why not apply the

(a) 8 Rep. 70, b.

(b) Sug. on Powers, App.

(c) 6 Bro. P. C. 168.

H. T. 1851. *Queen's Bench* general rule, that where no time is mentioned in the instrument it shall operate from its delivery?

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Another rule of construction is, that such a power in a deed, and *a fortiori* in a will, should be construed with reference to the prevailing practice in this country; and the words used by the testator must be taken in reference to any such prevailing usage. Now, in leases where terms for lives and years are granted, the usage is to consider them concurrent terms, and the most usual lease in this country is a lease for three lives and thirty-one years concurrent. Therefore we say that the words "three lives and forty-one years" are not improper words to express a lease for lives with a term of years concurrent; and that inasmuch as the prevailing usage in this country is to grant such leases for lives and years concurrent, this power should be construed with reference to such prevailing usage. The lease in this case must operate as a lease for three lives, and for so much of the term of forty-one years as might be subsisting at the death of the surviving life.

C. Andrews and Leslie, contra.

The intention of the party was to give an absolute interest, not a contingent interest, as contended for; and the use of the word "and" shows such was the intention.—[BLACKBURNE, C. J. The power is to make leases for any term, but your construction would authorise a lease for two distinct terms.]—That difficulty is explained in *Long v. Rankin*; "term" is there used as applicable to any estate, and is not confined merely to a chattel interest, it means a period of time. A leasing power is not to be construed strictly: *Shannon v. Bradstreet* (a).

If the term apply to both the lives and years, it must apply to a continuous interest in both. The donor does not point out any lease, but only puts a limit on the power, and within that any lease may be made. The words "not to exceed three lives and forty-one years" show that both are to be added together. A power to make leases generally extends only to leases in possession, not to leases in reversion: *Shecomb v. Hawkins* (b). The objection here is, that this is

(a) 1 Sch. & Lef. 52.

(b) Cr. Jac. 318.

a lease in *future*. Then it is said the term is uncertain, but *id certum est quod certum reddi potest*, and here the time from which it is to run is clearly pointed out: *Coventry v. Coventry (a)*; *Whitlock's case*.

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Pilkington, in reply.

If the lease were for three lives and forty-one years, no time being mentioned for the commencement of the term, it would then commence from the delivery of the lease. The use of the word "and" shows the intention was that the lives and years should be concurrent, and *Commons v. Marshall* so decides; Lord Lifford uses the word "and" in that case to make the terms concurrent: *Lord Netterville v. Marshall (b)*. This lease should be construed according to the prevailing custom, which is to consider the terms as concurrent:

Cur. ad. vult.

The Judges gave the following certificate:—

Jan. 24.

We are of opinion that the said power in the said lease stated authorized the said Delacherois Crommelin to grant said term of forty-one years, commencing from the 1st of November next preceding the death of such survivor as in said lease granted.

(a) Sug. on Powers, 599.

(b) Wallis's Rep. 96.

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Queen's Bench

JOHN JACK, Lessee of JOHN PARKE and JANE PARKE,

v.

M'LOUGHLIN and others.

Jan. 20.

A lease was executed by A and B as granting parties, and reserved the rent and right of re-entry to A alone. Held, that the assignee of the lessee was estopped, showing A had no interest in the premises.

EJECTMENT for non-payment of rent, tried before Pigot, C. B., at the last Summer Assizes of the county of Leitrim. The declaration contained two demises, laid respectively on the 1st of January 1845; and the lessors of the plaintiff claimed five years' rent, due and ending on the 25th of March 1850.

It appeared on the evidence given on behalf of the lessors that by indenture dated the 24th of June 1771, and made between William Parke and Samuel Parke of the one part, and Robert Shaw of the other part, William Parke and Samuel Parke, in consideration of the sum of £300 paid to them by Robert Shaw, demised the premises in question to Robert Shaw, his heirs, executors and administrators, for a term of four lives and three hundred years, yielding and paying to Samuel Parke, his heirs or assigns, the yearly rent of £1, with clause of distress or re-entry in case of non-payment of the rent so reserved to Samuel Parke; and in said lease was contained the following clause:—

“And at the end or expiration of the above three hundred years, if the sum of £300 is not paid to Robert Shaw, his heirs or assigns, by William Parke and Samuel Parke, their heirs or assigns, that the same lease is so to continue at the yearly rent of £1 per year until the said £300 is paid or satisfied; but when the said sum of £300 is paid to Robert Shaw, his heirs or assigns, that then and at that time the said Robert Shaw, his heirs or assigns, is to deliver up the quiet and peaceable possession of the said premises unto the said William Parke and Samuel Parke, their heirs or assigns, any thing to the contrary,” &c.

It further appeared that by indenture dated the 24th of April 1804, Patrick M'Loughlin became possessed of the interest of Shaw in the lease, and continued so to the time of his death in 1845, and

that the defendants derived under him, and it was admitted that the lessors of the plaintiff respectively represented William and Samuel Parke. It further appeared that John Parke, one of the lessors of the plaintiff, in December 1833, filed a bill in the Court of Chancery against Patrick M'Loughlin and against Jane Parke as heiress-at-law of Samuel Parke, the other lessor of the plaintiff, alleging that the deed of the 24th of June 1771 was a mortgage, and praying redemption; that a decree on sequestration was obtained against Jane Parke, and that this bill was dismissed for want of prosecution. It also appeared that a judgment creditor of Patrick M'Loughlin had presented a petition in the Court for the Sale of Incumbered Estates, praying for a sale of the lands in question as an estate in fee-simple, relying upon the Statute of Limitations; and an order for a sale was obtained thereon without prejudice to John Parke being at liberty to enforce his rights as landlord or mortgagee. The bill and answer in this cause were entered as read for the plaintiff. The plaintiff then read a paragraph from the answer of the defendant M'Loughlin, whereby he admitted that Samuel was the younger brother of William Parke, and that he believed he claimed some title or estate in the lands, and was in the habit of joining his brother William in all leases, and thereby denied that he merely joined his brother to secure the £300, or that the rent was reserved to Samuel Parke as trustee for William, and that he believed that Samuel had, or claimed, some title in the lands; that the rent had been paid to Samuel Parke up to his death, but that no demand or payment had been made since that time. The decree on sequestration was then entered as read for the plaintiff.

The plaintiffs having closed their case, Counsel for the defendants read a paragraph from the bill filed in the cause of *Parke v. M'Loughlin*, stating that William Parke, the grandfather of the lessor of the plaintiff John, being seised in fee of the lands in question, applied to Robert Shaw for a loan on mortgage of said lands, and that thereupon the instrument of the 24th of June 1771, in consideration of the rents and covenants, and especially in consideration of the sum of £300, was executed; that William Parke merely designed the same as a mortgage to secure the £300, and not as a lease; that Samuel Parke had no title or estate in the lands,

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and merely joined to secure the £300, and that the rent was reserved to Samuel as a trustee for William, and that John Parke alone was beneficially entitled to the premises. He read also the prayer of redemption, and also a portion of the defendant's answer, stating that he had not paid any rent for upwards of twenty years.

The learned Judge told the jury that, so far as the instrument of the 24th of June 1771 was a mortgage, the right of redemption was extinguished; and he left it to the jury to say in whom the estate in the lands in question was vested at the time the deed of the 25th of June 1771 was executed? and upon that issue the jury found that the estate was vested in William Parke alone, and not in Samuel Parke, and that Samuel Parke had no estate in the lands.

Counsel for the defendants then called on the learned Judge to say that the jury having found that Samuel Parke had no estate, the demise in the name of Jane Parke, as his heiress-at-law, could not be sustained, and that the defendants were entitled to a verdict on that demise; secondly, that as the rent was reserved under the instrument of 1771 to Samuel Parke, with right of re-entry, and as there was no reservation of rent to William Parke, the defendants were entitled to a verdict on the demise laid in the name of John Parke, his heir-at-law; thirdly, that the jury should be directed to find for the defendants, on the ground that the rights of the plaintiffs were barred by the Statute of Limitations, there being no evidence of payment of rent for upwards of twenty years. The learned Judge ultimately directed a verdict for the lessors of the plaintiff, which the jury found, reserving leave to the defendants to move to have a verdict entered for them.

A rule nisi having been obtained accordingly, cause was shown by

Gilmore and *J. S. Close*, for the plaintiffs.

First, are the plaintiffs entitled to say the relation of landlord and tenant was created by this instrument executed between William Parke, Samuel Parke and Robert Shaw? Secondly, if that relation subsists, then the reservation to Samuel Parke is a rent-service, not a rentcharge.

It is found that Samuel Parke had no estate in the lands; but Shaw accepted a demise from him by indenture, and agreed to pay

the rent to Samuel; he is therefore estopped saying that Samuel had no right to make the demise. Where an interest passes there is an estoppel.—[MOORE, J. If two persons join in a lease, the property being the estate of one, and the other having no estate at all, by consent the rent may be reserved to that one not having the estate, and so the reservation of rent to Samuel does not at all affect the validity of the lease.]—*Co. Lit.* p. 45, a:—"If the tenant of the land and a stranger, which hath nothing in the land, joyne in a lease for years by deed indented of one and the self same land, this is the lease of the tenant onely, and the confirmation of stranger, and yet the lease as to the stranger workes by conclusion." An ejectment for non-payment of rent may then be maintained under the Ejectment Statutes.

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Then is the Statute of Limitations (3 & 4 W. 4, c. 27) a bar to the plaintiff's recovering? *Grant v. Ellis* (a), *Crosbie v. Sugrue* (b), *Daly v. Lord Bloomfield* (c), are conclusive on that head to show the statute does not apply to conventional rents between landlord and tenant.

The circumstances of rent not being paid is not a ground for presuming a release; but a defendant who relies on a release to set aside a *prima facie* title must prove that release affirmatively, and such issue was not one for a jury: *Trevian v. Lawrance* (d).

Charles Andrews and *J. Robinson*, contra.

This is a question on the Ejectment Statutes as regards Jane claiming through Samuel, and the case of *Black v. Davis* (e) seems apposite to the matter. Bushe, C. J, in p. 98, says:—"In a Court of Law there can be no distinction between a mortgage of a landlord's entire interest and a sale of it out and out; and it cannot be contended that a man who grants to another his rent and reversion can afterwards evict one of his former tenants for non-payment of rent. It is plain that he can no longer maintain debt or covenant against that tenant or distrain upon him; these remedies have gone over to the grantee of the reversion, and he can no

(a) 9 Mees. & Wels. 113.

(b) 9 Ir. Law Rep. 17.

(c) 5 Ir. Law Rep. 75.

(d) Salk. 276.

(e) Batty, 80.

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"longer maintain them; and inasmuch as he ceases to be landlord
 "or lessor (the words used in the Ejectment Statutes), and inasmuch
 "as no rent after his assignment can grow due to him, it is impos-
 "sible that he can maintain an ejectment under these statutes."

The doctrine of estoppel has no applicability here: *Doe v. Lawrence* (a). It was there held a right of entry could not be reserved to a stranger to the estate.—[MOORE, J. In that case the *cestui que trusts* were not parties to the lease. Now, suppose a lease of five co-parceners entitled to an estate in five equal portions, and they join in a lease with a sixth party, and the recital in the lease expresses the inconvenience of reserving rent to the six, but that by arrangement it was agreed to reserve it to that sixth person, who had no interest in the premises, in such a case would not an ejectment be maintainable?—The jury have found Samuel had no estate in the premises, and in *Bell v. Flattery* (b) CRAMPTON, J., says he who re-enters must be in of his former estate. Jane here, claiming under Samuel, cannot be in of that estate.—[BLACKBURN, C. J. How can an estoppel be waived?—*Ludford v. Barber* (c); *Bowman v. Rostron* (d). The action, being ejectment, did not admit that the matter of estoppel could be pleaded. The question must arise on the evidence; the plaintiff waived the estoppel, and gave in evidence the document which displaced the estoppel by giving in evidence the bill in that cause, and the jury have found according to the fact.—[MOORE, J. An estoppel may be waived by matter on the pleading.]—*Doe d. Strode v. Seaton* (e).

Close replied, and on the question of estoppel relied on 2 *Smith Leading Cas.* p. 435; and referred to 2 *Wms. Saund.* p. 371, note 7; *Doe d. Spencer v. Beckett* (f).

BLACKBURN, C. J.

This is an ejectment for non-payment of rent. Two questions have been submitted for the judgment of the Court. First, is the ejectment maintainable? Secondly, if it be so, does the Statute of

(a) 4 Taunt. 23.

(c) 1 T. R. 90.

(e) 2 Cr. M. & Ros. 728.

(b) J. & B. 208.

(d) 2 Ad. & El. 295.

(f) 4 Q. B. 601.

Limitations bar the right of the plaintiff to recover? The second question, however, will become immaterial, if the rent reserved be a conventional rent; for if it be, the demand of the plaintiff is not barred, and he is clearly entitled to recover.

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The lease in question is made by William Parke and Samuel Parke (the two granting parties) to Robert Shaw. The rent is reserved to Samuel Parke alone, with a clause of distress and re-entry to Samuel. The ejectment is brought by parties representing both William and Samuel; but it is plain the representatives of William cannot recover, as no rent was reserved to him. Can then the representatives of Samuel not recover? This is the case of a demise by two persons by indenture, and the action is brought against the assignee of the estate thereby created, who is bound just as the original lessee was bound. Suppose the ejectment was brought on the demise of Samuel himself against the lessee, he could not allege that Samuel had no title, for he would have been estopped to rely on his want of title, as if the lessor would have been estopped, so must the assignee of the lessee; the passage cited from *Co. Lit.* p. 45, *a.*, directly applies to the case before us:—"If the tenant of the land, and a stranger, which hath nothing in the land, joyne in a lease for years by deed indented of one and the self same land, this is the lease of the tenant onely, and the confirmation of the stranger, and yet the lease as to the stranger workes by conclusion." This shows that as between the original parties this instrument operated by estoppel; and I cannot discover any reason or authority for holding that the parol evidence which the plaintiff gave at the trial in support of his right under this lease amounts to a waiver of his right to rely on the deed as having had that operation. The verdict therefore must stand.

MOORE, J.

I am of the same opinion, and for the same reasons.

Cause allowed, with costs.*

* CRAMPTON, J., and PERRIN, J., *absentibus*.

E. T. 1851.
Queen's Bench

JOHN KELLY v. HENRY CARROLL.

May 2.

A declaration in its commencement did not state whether the plaintiff sued in person or by attorney. *Held*, on special demurrer, that such mode of declaring was bad, and that in all cases the form prescribed by the 44th Rule must be followed.

There was an action of libel, and the declaration contained two counts. The commencement was in this form:—"John Kelly, the plaintiff in this action, complains of Henry Carroll, the defendant in this action, of a plea of trespass." A general demurrer was taken to both counts of the declaration, on the ground that the libel complained of was a privileged communication; but as the Court gave no opinion on this point, it becomes unnecessary to set out the declaration. There were, however, two causes of special demurrer assigned; one, that the plaintiff not being a practising attorney, or alleging that he was an attorney or officer of the Court, or otherwise entitled to appear or sue in his proper person, had by said declaration complained, without stating that he did so by attorney, or excusing his doing so without attorney; and that the declaration was contrary to the law and practice in this Court; inasmuch as it was not therein stated that the plaintiff complained by attorney or in his proper person; and that it did not commence in the form prescribed by the 44th General Order. The other cause of demurrer assigned was, that there was no venue stated in the body of the declaration; but as the Court, on the latter cause, at once intimated it was cured by the 45th General Order, they directed Counsel to apply himself to the first special point.

H. Smythe (with him *Fitzgibbon*), for the demurrer:

The Courts have made General Orders in pursuance of an Act of Parliament; and those Rules are to have the effect of a legislative enactment. The 44th General Order is to this effect:—"Every declaration shall commence in the following form: A B, by E F his attorney or (otherwise, as the case may be), complains of C D.

NOTE.—As involving a point of practice, this case is printed in advance of the Term in which it was decided.

"for," &c. In *Chitty Jr. Precedents*, p. 31, there is a form of E. T. 1851. special demurrer given on this ground: *Butler v. Mapp* (a). Queen's Bench

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Charles Kelly, contra, argued that the Judges' Orders could not alter the rules of pleading; that this was at most an irregularity, and could only be dealt with on motion to set aside the declaration as irregular.

BLACKBURN, C. J.

The rule has the effect of an express legislative enactment; we feel bound to uphold our own Orders, and there being a prescribed form of declaration by the 44th General Order, it must be adopted in all cases. The demurrer must be allowed; but we will permit the plaintiff to amend on payment of costs.

(a) 10 Bing. 391.

HOWARD v. M'NEVIN.

May 9.

J. O'LOGHLEN moved to set aside the plea in this case for irregularity, it being improperly entitled. The plea is entitled as bearing date the 5th of February 1851, omitting the words, "in the year of our Lord;" and the 43rd General Order directs that every pleading shall be entitled of the day of the month and year in which it is filed. By the omission of these words the figures are unintelligible, and in England pleas have been set aside for such an irregularity: *Arch. Prac. by Chitty*, 193, note h (8th ed.)

Where a plea bore date the 5th of February 1851, omitting the words, "in the year of our Lord:"—
Held, such omission was no ground for setting aside the plea for irregularity.

J. D. Fitzgerald, contra, was not called on.

Per Curiam.

Refuse this motion; but as the practice is new, and as the authorities in England may have given ground for the motion, let there be no costs.

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Queen's Bench

The Rev. THOMAS LITTLE

v.

LORD CLEMENTS.

Jan. 21, 24,
 25.

Where a charge was preferred before a Justice of the Peace against a clergyman, for an assault with intent to commit a felony, and the Justice of the Peace reduced the statement into writing in the form of a declaration, as prescribed by the statute 5 & 6 W. 4, c. 62, and signed it as such Justice, and returned it enclosed in an envelope to the complainant for delivery to the Dean of the diocese according to his request, in order that this declaration might be laid before the Bishop for investigation:—

Held, that on such a state of facts a question ought to have been left to the jury to say whether the Justice of the Peace acted *bona fide*, and under the belief that he was acting in the execution of his duty, and in a matter within his jurisdiction as such Justice?

Held also, that it was for the jury to say whether, under the circumstances, the communication was a privileged communication, and whether the Justice acted *bona fide* and without malice in its publication?

Semble—If the jury found such facts in the affirmative, the Justice was within the protection of the statute 12 Vic. c. 16, and entitled to notice of action.

Semble—The 5 & 6 W. 4, c. 62, does not authorise a Justice of the Peace to take a declaration charging a party with a criminal offence.

TRESPASS on the case for libel. The declaration contained five counts. The first count stated that the plaintiff was a clerk in holy orders of the United Church of England and Ireland, and officiated as such in the parish of Cloone, in the county of Leitrim, in the diocese of Kilmore, and that the defendant was a Justice of the Peace for said county. That a charge had been preferred before the defendant as such Justice by one Anne Thompson against the plaintiff while he was such clerk in orders, of indecent and improper behaviour towards her, and assault, with intent, &c.; and that the said Anne Thompson made a declaration before the defendant in support of the charge, but that no indictment or other criminal proceeding had been instituted against the plaintiff in respect thereof, and the same had since remained undecided.

It then averred that the defendant, maliciously intending to injure the plaintiff as such clerk, and whilst the subject of such charge was undecided, falsely and maliciously, and not in the execution and discharge of his duty as Justice of the Peace, or of any official duty, and without any reasonable or probable cause, did publish of and concerning the plaintiff as such clerk, &c., and of and concerning said charge, a certain false, scandalous, malicious and defamatory

libel, purporting to be the declaration of the said Anne Thompson, in the words following—[setting out the declaration *in hæc verba*, with innuendoes],—and concluded with an averment of special damage.

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The other counts did not materially differ. Damages were laid at £1000, and the defendant pleaded the general issue.

At the trial before the LORD CHIEF JUSTICE, at the Sittings after last Michaelmas Term, to prove publication of the libel the plaintiff produced the Rev. Arthur Hyde, the rural Dean of the diocese. He deposed that he had received the declaration in question in July or August 1850 from Anne Thompson, who came to his house with her husband, and handed it to him. That this document was in the defendant's handwriting, and that shortly after he had so received it he apprised the plaintiff of its contents through his brother curate, the Rev. Andrew Hogg.

On his cross-examination he stated that it was in his character as rural Dean that he had received the declaration, that it was delivered to him in an envelope; but he could not say whether it was sealed or not; and if addressed at all it was addressed in the defendant's handwriting; that he gave it to the Rev. Andrew Hogg in order that he might show it to the plaintiff's Rector. That in consequence of a written application made to him by the plaintiff for a copy of the declaration, he had given him the copy then produced; that the matters set forth in the declaration were intended to be made the subject of a complaint to the Bishop, and that he as the rural Dean knew that no investigation did take place before the Bishop, the reason being that the plaintiff had in the meantime resigned and ceased to be a clergyman of the diocese; that he had never given a copy of the declaration to any one except for the purpose above mentioned; that he had seen the husband of Anne Thompson before the making of the declaration; that he did not know that Thompson and his wife were going before a Justice, but that in consequence of what had been told him by the husband, he suggested that they should go before the nearest Magistrate, but he did not name any Magistrate; that Lord Clements was the nearest magistrate; that about two days after that interview he received the declaration from Thompson and wife; that previous to the taking of

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the declaration he had a verbal communication with Lord Clements as to the declaration, and he suggested to Lord Clements to take the declaration himself, for these reasons:—first, as the character of a clergyman was involved; secondly, as he did not wish to trespass on the Bishop's time without having something stronger to go by than a mere verbal statement. That plaintiff had stated to witness he wanted the copy of the declaration in order to get an investigation of the matter before the Bishop; and that he never knew of any misunderstanding having existed between plaintiff and defendant.

On re-examination he stated that he showed the declaration to other clergymen, and among them to a brother rural Dean to obtain his advice; that he believed that he as rural Dean was the proper channel through which a complaint should be brought before the Bishop.

The declaration was then read in evidence, and was as follows:—
 County of Leitrim, } “I, Anne Thompson of, &c., do solemnly and
 to wit. }
 _____ “sincerely declare that the Reverend Thomas

“Little,” &c. [stating the charge], and concluded thus:—“I make
 “the above declaration conscientiously believing the same to be true.

“Taken and acknowledged before me this 12th of March 1850.

“CLEMENTS, J. P.”

The case for the plaintiff having closed, the defendant's Counsel called for a nonsuit or a direction for a verdict for the defendant, inasmuch as no notice of action was proved to have been given to the defendant, although it appeared from the evidence of the plaintiff that the defendant was a Justice of the Peace, and that the act complained of had been done by the defendant in the execution of his office as such Justice, and also that the venue ought to have been laid in the county of Leitrim, the cause of action having arisen there. This the CHIEF JUSTICE refused.

The defendant calling no witnesses, the CHIEF JUSTICE told the jury that the declaration was in its nature libellous and defamatory, and that the publication of it by the defendant was not on a justifiable occasion; that although as a Magistrate he might have jurisdiction to take the declaration and to hear the complaint, or to take informations, yet that the act of publication was distinct from the taking

of the declaration ; that the defendant had no right to publish the declaration, and that in doing so he went plainly beyond his province and acted illegally, and that his conduct being in that respect illegal, he was responsible in damages to the plaintiff. He left it to the jury to decide—first, whether the declaration was a libel ; secondly, whether it had been published by the defendant.

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Several exceptions were taken to this charge on behalf of the defendant:—First, on the ground that the jury should have been told that this was a privileged communication; secondly, that if they believed there had been no actual malice or want of *bona fides*, they should find for the defendant; thirdly, that the act complained of having been done by the defendant in the execution of his duty as a Justice of the Peace, and with respect to a matter within his jurisdiction as such Justice, it was necessary, in order to give the plaintiff a ground of action, that the same should have been done by the defendant maliciously and without reasonable or probable cause; and if they believed there was no evidence of malice and want of probable cause, they should find for the defendant; fourthly, that if the jury believed that the defendant had acted without malice and under a *bona fide* belief that he was executing his duty as a Justice of the Peace, even although he was in that respect mistaken, and although the act was not strictly within the scope of his duty, yet they should find for the defendant.

The jury found for the plaintiff.

These exceptions having been set down for argument—

Hayes (with him was *Macdonogh*), in support of the exceptions.

The defendant having in his magisterial capacity done the act complained of, is entitled to the protection of the statute 12 & 13 Vic. c. 16 (An Act to protect Justices of the Peace in Ireland from vexatious actions for acts done by them in the execution of their office).*

* Section 1 enacts, That every action hereafter to be brought against any Justice of the Peace in Ireland in any of her Majesty's Superior Courts of Law at Dublin, for any act done by him in the execution of his duty as such Justice, with respect to any matter within his jurisdiction as such Justice, shall be an action on the

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In this case the act complained of was committed in the county Leitrim; the venue therefore ought, in pursuance of the 10th section of that statute, to have been laid in that county. Secondly, a month's notice of bringing the action is rendered necessary by the 9th section; and thirdly, proof should have been given that the cause of action arose within six months before action brought. Upon these grounds the plaintiff ought to have been nonsuited.

This statute is confined to any act done by a Justice of the Peace in the execution of his duty; the Act here complained of was within the scope of his duty; for by the 5 & 6 W. 4, c. 62,* had the

case as for a *tort*; and in the declaration it shall be expressly alleged that such act was done maliciously, and without reasonable and probable cause; and if at the trial of any such action, upon the general issue being pleaded, the plaintiff shall fail to prove such allegation, he shall be nonsuit, or a verdict shall be given for the defendant: and by section 2, where the act is done by the Justice in a matter of which he has no jurisdiction, or where he exceeds his jurisdiction, he may be sued as before the statute, except where the act complained of has been done under a conviction or order, in which case the conviction must be first quashed, or if done under a warrant for appearance, followed by a conviction or order, the conviction or order must be first quashed; but if not followed by conviction or order, and granted after information for an indictable offence, or after service of summons and non-attendance, no action can be maintained.

Section 8 enacts, That no action shall be brought for any thing done by a Justice of the Peace in the execution of his office, unless commenced within six calendar months after the act complained of shall have been committed.

Section 9.—No such action shall be commenced against any such Justice of the Peace until one calendar month at least after a notice in writing of such intended action, stating the cause of action, &c.

Section 10.—In every such action the venue shall be laid in the county where the act complained of was committed.

Section 12.—If at the trial of any such action the plaintiff shall not prove that such action was brought within the time limited, or that such notice was given one calendar month before such action was commenced, or if he shall not prove the cause of action stated in such notice, or if he shall not prove that such cause of action arose in the county or place laid as venue in the declaration, then and in every such case such plaintiff shall be nonsuit, or the jury shall give a verdict for the defendant.

* 5 & 6 W. 4, c. 62 (An Act to make Provision for the Abolition of Unnecessary Oaths).—Section 13, after reciting that a practice had prevailed of administering and receiving oaths and affidavits voluntarily taken and made in matters not the subject of any judicial inquiry, nor in anywise pending or at issue before the Justice of the Peace, or other person by whom such oaths had been administered or received, and that doubts had arisen whether or not such proceedings were illegal, enacts, That it shall not be lawful for any Justice of the Peace, &c., to

defendant refused to take this declaration, it would have been a breach of his duty. The subject-matter of the declaration is one of those *other matters* alluded to in the 18th section of that Act.

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But then it is said, admitting the taking of the declaration was legal, something more was done by the defendant which was illegal, he having returned the declaration to the party making it. The same principle applies to a declaration as to an affidavit, which the Magistrate is bound to restore to the party making it; were it not so, the whole object and purport of the Act would be defeated.—[MOORE, J. May not *other matters*, referred to in that section, apply to matters similar to those before enumerated therein?—The enacting part of the section is sufficiently extensive to include this matter also.—[PERRIN, J. Has a Justice of the Peace a right to take a declaration in a case where he has authority to institute a judicial proceeding, and where he might have grounded a prosecution on the information of the party preferring the charge against the plaintiff?—Of course, if the party wished to institute a criminal proceeding, the declaration would be useless. The accused was equally liable to ecclesiastical censure as to the criminal charge.

But supposing us wrong in this branch of the argument, the defendant was clearly entitled to notice of action, he having acted *bona fide*, therefore a question as to *bona fides* ought to have been left to the jury. Where a party *bona fide* believes or supposes he is acting in pursuance of an Act of Parliament, he is within its protection: *Cook v. Clark* (a); *Bird v. Gunston* (b); *Beechy v.*

(a) 10 Bing. 19.

(b) 2 Chit. R. 459.

administer any oath, affidavit or solemn affirmation, touching any matter or thing whereof such Justice or other person hath not jurisdiction or cognizance by some statute in force at the time being: Provided always, that nothing herein contained shall be construed to extend to any oath, &c., before any Justice in any matter, &c., touching the preservation of the peace or punishment of offences, &c., s. 18. That whereas it may be necessary and proper in many cases, not herein specified, to require confirmation of written instruments or allegations, or proof of debts or of the execution of deeds, or *other matters*, enacts that it shall be lawful for any Justice of the Peace, or other officer by law authorised to administer an oath, to take the declaration of any person voluntarily making the same before him in the form in the schedule thereto annexed; and if such declaration be false, the person making same shall be guilty of a misdemeanour.

H. T. 1851. *Sides* (a). In *Ballinger v. Ferris* (b), Abinger, C. B., says:—"We
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 "to say that where there is a doubt as to the authority of the party,
 "but none as to his motives, he should not have the opportunity which
 "the Legislature designed to give him of tendering amends:" *Rudd*
v. Scott (c); *Hughes v. Buckland* (d). It was there held that all
 who *bona fide* and reasonably think they fill the character mentioned
 in the several statutes, and act in pursuance of them, are protected:
Wedge v. Berkeley (e); *Horn v. Thornborough* (f). It is said,
 however, that the party is answerable for the publication; but the
 proceedings here must be considered as all one transaction: *Theo-*
bald v. Crichmore (g). Here the CHIEF JUSTICE told the jury that
 though the defendant might have been justified in receiving the
 declaration, he was answerable for its publication.—[BLACK-
 BURNE, C. J. I told the jury whatever jurisdiction the defendant
 had as a Magistrate in criminal cases, he had no right to make
 himself ancillary to the Ecclesiastical Court.—MOORE, J. Sup-
 pose a person come before a Magistrate and make a complaint of an
 indictable offence, and the Magistrate take informations, would that
 warrant him in sending the informations round the world?—No;
 but if he were acting *bona fide*, he would not be liable to an action,
 and that should go to the jury.—[MOORE, J. I put that case in
 reference to the argument as to the divisibility of the charge; for
 although the Magistrate might be justified in taking the declaration
 if he acted *bona fide*, then the question would arise as to his being
 justified in the publication of it.—CRAMPTON, J. There are
 matters which a party may be authorised in communicating; he
 may make representations to the proper authorities, or deliver
 speeches in the Houses of Parliament; but then if he publish these
 representations or speeches, they cease to be privileged communica-
 tions.]—But this action is for the publication of a libel.—[MOORE, J.
 Suppose one come to inquire as to the character of a servant, the

(a) 9 B. & C. 806.

(b) 1 M. & W. 632.

(c) 2 Sc. N. R. 631.

(d) 15 M. & W. 346.

(e) 6 A. & E. 663.

(f) 3 Ex. R. 846.

(g) 1 B. & Al. 227.

master is privileged in giving the character he thinks he deserved; but if he state it publicly before five hundred others, who are not inquiring as to the character, he would not be justified in doing so; so here he may have been justified in taking the declaration, and yet not be justified in publishing it.]—As to the question of its being a privileged communication, that was a question also for the jury: *Lake v. King* (a). Here there was no evidence to show malice on the part of the defendant: *Fairman v. Ives* (b); *Weatherston v. Hawkins* (c); *Dunman v. Biggs* (d); *Child v. Affleak* (e). Actual malice has been negatived here; the plaintiff was the curate of Lord Clement's parish, and he was entitled to mention the complaint.

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Carleton and Martley, contra.

First, as to the question of notice. It may be either a question of law or of fact, according as the party either admits the existence of the facts necessary to give jurisdiction, and denies the abstract legal right to do the act; or, on the other hand, admits the legal right to do the act, but denies the existence of the facts necessary to give jurisdiction. As, for example, if a Justice of the Peace direct a man to be arrested on a Sunday for poaching, but deny the legal right to arrest on a Sunday, thus raising a question of law; or admitting the legal right to arrest on Sunday, he may deny that he had been poaching, thus raising a question of fact. All the cases cited on the other side are of the latter class, and in them it was properly a question of fact for the decision of the jury, whether the defendant acted *bona fide* in the discharge of his duty as Justice of the Peace? For instance, in *Wedge v. Berkeley* there was no dispute about Berkeley's abstract right to arrest the plaintiff; but the dispute was, whether he had *bona fide* believed the grass in the sacks to have been stolen, which may, in the language of Jeremy Bentham, be "a psychological fact" for the decision of the jury. But the present case is of the former class; there is no dispute here

(a) 1 Saund. 131, a.

(b) 5 B. & AL. 647.

(c) 1 T. R. 110.

(d) 1 Camp. 269.

(e) 9 B. & C. 403.

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about facts, but merely a question as to the abstract legal authority of the defendant to do the act complained of; it is a question of law for the Court whether the defendant had reasonable ground for believing that he was acting within the scope of his authority; in other words, whether there was such a legal resemblance between the act complained of and other acts admittedly within the scope of his authority, as that he might reasonably have been misled by the resemblance? That is plainly a question of law for the Court, and therefore the objection that the question of *bona fides* ought to have been left to the jury cannot prevail. In *Weller v. Toke* (a) it was decided that the Justice had the legal abstract right, but the exercise of that right was not warranted by the facts.—[BLACKBURN, C. J. You say it was for the Judge, looking to the act done, to say whether by possibility the defendant could have done that act under the belief it was a magisterial duty?—MOORE, J. How could you make this declaration unjustifiable unless you show use was made of it in some way.]—By giving it to others, the defendant acted in direct violation of his duty. The 20th section of 12 & 13 Vic. c. 67, requires that every information, examination or recognizance taken before a Justice not sitting in Petty Sessions shall be forthwith transmitted to the Clerk of the Petty Sessions of the district. The 5 & 6 W. 4, c. 62, substitutes a declaration for an affidavit, but was never intended to make a declaration legal when an affidavit would not be so: *Maloney v. Bartley* (b).

The next question is, assuming that the defendant acted within his jurisdiction, was there justifiable occasion, and was there a *bona fide* use made of that justifiable occasion? The former was a question for the Judge, and he decided it was not a justifiable occasion; therefore no question remained for the jury to decide.—[CRAMPTON, J. May not the question of justifiable occasion be a mixed question of law and fact? According to the argument on the other side, by the 18th section of 5 & 6 W. 4, c. 62, a Justice of the Peace would be bound to attest any declaration or charge, no matter how libellous, and that argument is grounded on the use of the words "other matters," used in that section, which clearly can only

(a) 9 East, 364.

(b) 3 Camp. 210.

apply to matters *ejusdem generis*, such as proof of debts, execution of deeds, &c. ; if, therefore, the Justice had not the power of attesting the instrument, he had not the power of handing it over for publication.]—*Rex v. Lee* (a) ; *Duncan v. Thwaites* (b). In all the cases where notice has been held necessary, the Justice had acted within the scope of his duty, and then it became a question of *bona fide* intention. Then as to the question of its being a privileged communication.—[CRAMPTON, J. Suppose the Justice had forwarded this *bona fide* to the Bishop, would you hold him to be privileged?]—If there was evidence to show that he had done so *quâ* parishioner, that would be evidence of a privileged communication ; but there is nothing to show he acted in such a capacity.—[MOORE, J. Suppose the rural Dean had gone to the defendant, and that the defendant had communicated the information to him, would that be a privileged communication?]—No ; neither as a Justice of the Peace or as a parishioner would his interest or duty be involved.—[MOORE, J. Suppose I apply for a character of a servant to a friend, would not a character given by him in reply to such application be a privileged communication, and may not the defendant be considered as the agent of Hyde, he alone being put in action for the purpose?]—There is nothing to show that the defendant was employed by Hyde to collect information : *Rex v. Beare* (c) ; *Blagg v. Sturt* (d).

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Maedonogh, in reply.

The defendant was entitled to a qualified protection—namely, a notice of action. The right to do the act is one thing—the right to notice of action is another. The distinction is clear between that which amounts to a defence, and that which entitles to notice. In this case notice of action was clearly essential. The defendant, it is conceded, acted as a Justice, and he had full jurisdiction over the offence imputed to the plaintiff. He might have taken informations against him, and committed him for want of bail. He was applied to as a Magistrate to act in the taking of this declaration, and he

(a) 5 Esp. 123.

(b) 3 B. & C. 556.

(c) 1 L. Ray. 416.

(d) 10 Q. B. 899.

H. T. 1851. assumed to act as such. These acts were not wholly alien from his jurisdiction, and were not done *diverso intuitu*.

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In *Haseldine v. Grove (a)*, Lord Denman lays down the principle thus:—"That when a Magistrate, with some colour of reason, and *bona fide* believes that he is acting in pursuance of his lawful authority, he is entitled to protection, although he may proceed illegally, or exceed his jurisdiction." In the case of *Weller v. Toke*, Lord Ellenborough says:—"The very object of the Legislature in requiring the notice to be given was to enable the Magistrate to tender amends as for the wrong done, contemplating him as wrong-doer." *Prestidge v. Woodman (b)*. A notice of action would be superfluous if it were required only when a Magistrate acted within his jurisdiction: *Cox v. Reid (c)*; *Briggs v. Evelyn (d)*; there the presumption was that the lord of a manor had acted as a Justice so as to entitle him to notice; and it is immaterial what the form of action is: *Waterhouse v. Keen (e)*.

A distinction has been attempted to be taken as arising from two states of facts:—First, it is said, if the party deny the legal right of the Justice to do such an act, the authority is admitted, but the facts are denied. Secondly, if the defendant admit the facts, he denies the title in law. In *Balinger v. Faris*, neither authority existed in law, nor did the facts warrant the exercise of it. The true distinction is, did the defendant fill the character of Justice, and did he intend to act in that character? and if so, then, however erroneously or illegally he may have acted, he is entitled to notice of action: *Culverson v. Melton (f)*.

With regard to the question of malice, the evidence rebuts the existence of any, and this must be considered as a privileged communication: *Toogood v. Spyring (g)*; *Padmore v. Lawrence (h)*; *Wright v. Woodgate (i)*; *Delany v. Jones (k)*; *Woodward v. Lander (l)*; *Warr v. Jolly (m)*.

Cur. ad. vult.

(a) 12 Law Jour. N. S. 15, Mag. Cas.

(c) 13 Jur. 563.

(e) 4 B. & C. 209.

(g) 1 C. M. & R. 193.

(i) 2 C. M. & R. 573.

(l) 6 C. & P. 548.

(b) 1 B. & C. 12.

(d) 2 H. Bl. 114.

(f) 2 M. & R. 200.

(h) 11 A. & E. 380.

(k) 4 Esp. 191.

(m) 6 C. & P. 497.

BLACKBURNE, C. J.

In this case the Court are unanimously of opinion that there should be a new trial, and that I should have left it to the jury, on the first point, to say whether or not Lord Clements was acting *bona fide*, and whether or not he believed he was acting, and intended to act, in a matter within his jurisdiction as a Magistrate in publishing the libel complained of? and on the second question raised by the exceptions, whether the publication was privileged by the occasion of it, the Court also think it was privileged, and that it should have been left to the jury to say whether the publication was without malice and *bona fide*? If the case be again tried before me, I shall of course submit these considerations to the jury.

*Venire de novo.*H. T. 1851.
*Queen's Bench*LITTLE
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CLEMENTS.
Jan. 25.

GEORGE WHITE and ALBERT WHITE

v.

JAMES M'CANN and WILLIAM M'CANN.

Jan. 28, 30.

TRESPASS on the case.—The declaration contained three counts. The first stated that the plaintiffs, before and at the time of the committing of the grievances by the defendants, were, and still are, possessed of a certain corn-store, kiln and premises, situate at, &c., for the residue of a certain term of years unexpired, by virtue of an indenture of demise of 20th of January 1842, made between Richard Pope of the one part, and the plaintiffs of the other part; whereby the plaintiffs for themselves, their executors, administrators and assigns, did covenant with Richard Pope, his executors, administrators and assigns, that they should and would, during the continuance of the term, well and sufficiently support, maintain

The plaintiffs, holding premises under a lease, containing a covenant to keep and maintain the same in tenantable order and condition, demised the premises to the defendants as tenants from year to year. During the tenancy of the defendants an accidental fire broke out, and the premises were de-

stroyed. *Held*, that an action on the case in the nature of waste was not maintainable against the defendants, the jury having found there was no default on their part.

Semble.—Fire not occasioned by negligence is not waste; and when an injury is merely the result of accident, without neglect, the waste therefrom resulting is not permissive.

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and keep the said corn-store, kiln, and premises in good and sufficient tenantable order, repair and condition, and at the end or expiration, or other sooner determination of the said demise, so leave and yield up the same in like good and sufficient order, repair and condition, to wit at, &c.

It then averred that whilst the plaintiffs were so possessed, and before and at the time of the committing of the grievances, &c., the defendants held and enjoyed the corn-store, kiln and premises as tenants thereof to the plaintiffs from year to year for so long a term as the plaintiffs and defendants should respectively please, and that the defendants, as such tenants, were then in the occupation of the said corn-store, kiln and premises, the reversion thereof belonging to the plaintiffs for the residue of the term, to wit, &c. *Breach*, that the defendants contriving, &c., and whilst they so held and enjoyed the said corn-store, kiln and premises as tenants thereof from year to year to the plaintiffs, the reversion thereof belonging to the plaintiffs, negligently, carelessly and improvidently lighted and kept a fire in the corn-store, &c.; that by reason of the negligence, carelessness and improvidence of the defendants and their servants in that behalf, the corn-store, kiln and premises were then set on fire, burned down and destroyed, and became and were, and still are, wholly ruined, whereby the plaintiffs were and are greatly injured and damnified in their estate and interest in the corn-store, kiln and premises, and became and are liable and responsible to Richard Pope, to whom the reversion immediately expectant still belonged, to rebuild and repair the same; by virtue of the indenture of demise and the covenant therein contained, and were afterwards, to wit, &c., called upon and requested by Richard Pope to repair and rebuild the same, to wit at, &c.

The second count alleged that the defendants cared and attended to the corn-store, kiln and premises in so negligent and improper a manner that for want of the due and proper care, preservation and protection thereof by the defendants, and for want of due precaution in that behalf, the corn-store, kiln and premises were then set on fire, burnt down and destroyed, and became and were, and still are, wholly ruinous, to wit at, &c., whereby the plaintiffs were and

are greatly injured, &c., in their reversionary estate in the corn-store, kiln and premises, and have become and are liable and subject to great charges and responsibility, by virtue of said indenture of demise and covenant, &c., to wit at, &c.

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The third count charged that the defendants wrongfully and injuriously suffered and permitted the corn-store, kiln and premises to be burnt down and destroyed by fire, and to be and become wholly prostrate and ruinous for want of the needful and necessary preservation and care thereof, and suffered and permitted the same to remain so prostrate and ruinous from thence hitherto for want of the needful repairing and rebuilding thereof, to wit at, &c., whereby the plaintiffs were and are injured, &c., and became and are liable to repair and rebuild the same, by virtue of the the said indenture and covenant, to wit, &c.

The damages were laid at £3000, and the defendants pleaded not guilty.

At the trial of the case at the Summer Assizes of 1850, for the county of Waterford, before Pennefather, B., he directed the jury that, if they were of opinion there was no negligence on the part of the defendants, to find for them on the first two counts, and to find for the plaintiffs on the third count, reserving liberty to the defendants to move the Court to enter a verdict for them. The jury found for the defendants on the first and second counts, and for the plaintiffs on the third count, with £1000 damages.

In Michaelmas Term 1850, a rule *nisi* having been obtained in pursuance of the leave reserved, and cause being shown against the order being made absolute, the Court directed that a special verdict might be found, in order that the question might be solemnly determined, and such was prepared by consent and returned as the finding of the jury. It was to this effect:—that the plaintiffs, at the time of the letting to the defendants, and at the time of the fire, held the corn-store, kiln and premises under an indenture of lease of the 21st of January 1842, which contained a covenant, as set out in the declaration, that the plaintiffs, whilst so possessed, on the 28th of September 1849, demised the premises to the defendants, to hold the same as tenants from year to year at the rent of £95; that the

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J. E. Walsh and Martley were now heard for the plaintiffs.

First, we say that within the Statutes of Gloucester and of Marlbridge, tenants for years, including those from year to year, are liable for permissive waste. Secondly, accidental fire is permissive waste. Thirdly, that wherever the landlord is liable over to the owner in fee, the tenant is liable over to the immediate landlord. The Irish statute, as to accidental fires, does not touch the case.

The Statute of Marlbridge is 52 *Hen.* 3, c. 23, and it provides "that fermors during their terms shall not make waste, sale, nor "exile of house, &c., nor of any thing belonging to the tenements "that they have to ferm, without special license had by writing of "covenant, &c., which thing, if they do, and thereof be convict, "they shall yield full damage," &c. In 1 *Inst.* p. 145, Lord Coke, commenting on this statute, says:—"The mischief before the statute "was, that against leasees for life or years, there lay no prohibition "of waste at the Common Law, because they came in by the act of "the lessor, and he might have provided, upon the making of the "lease, against waste to be done, and he that might, and would not,

“provide for himself, the Common Law would not provide for; otherwise it is of estates created by law, as tenant in dower and the gardien; but seeing waste and destruction is hurtful to the commonwealth, this Act provideth remedy for waste done by lessee for life or lessee for years; and it is the first statute that gave remedy in these cases; for the rule of the Register is, that there are five manner of writs of waste, viz., two at the Common Law, as for waste done by tenant in dower or by the gardien; and three by statute, or special law, as against tenants for life, tenants for years, and tenants by the curtesy.” Again he says:—“To doe or make waste, in legall understanding in this place, includes as well permissive waste, which is waste by reason of omission, or not doing, as for want of reparation, as waste by reason of commission, as to cut down timber trees, or prostrate houses or the like.” The Statute of Gloucester is 6 *Edw.* 1, c. 5, and it provides that “a man from henceforth shall have a writ of waste in the Chancery against him that holdeth by the law of England, or otherwise, for terme of life, or for terms of years.” And in reference to this statute, in 1 *Inst.* p. 302, it is said:—“Voluntary waste and permissive waste is all one to him that hath the inheritance. But if the waste be done by the enemies of the King, the tenant shall not answer for the waste done by them, for the tenant hath no remedy over against them. The same law it is if the waste be done by tempest, lightning, or the like, the tenant shall not answer for it:” *Co. Lit.* p. 53 *a*, 53 *b*, 54 *a*; 2 *Rolle. Ab.* p. 816, *plac.* 36, 37; *Ibid.* p. 828, *plac.* 11; 1 *Wms. Saund.* p. 323, *Ed.*; *Kinkyside v. Thornton* (*a*). Case in nature of waste will lie again a tenant for years after the expiration of his term, as well as covenant for the breach of those contained in his lease. The other side will rely on the cases cited in the note to *Wms. Saunders: Gibson v. Wells* (*b*); but that was an action against a tenant at will. *Herne v. Bembow* (*c*) was also against a tenant at will; and the opinion which the Court in that case expressed was extra-judicial.

In *Jones v. Hill* (*d*), the marginal note is not warranted by the

(*a*) 2 W. BL. 1111.

(*b*) 1 New. R. 290.

(*c*) 4 Taunt. 764.

(*d*) 7 Taunt. 392.

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judgment; for that was an action against a tenant for twenty-one years, who had covenanted to repair; and Gibbs, C. J., says:—"I do not say whether permissive waste may or may not lie, but it is impossible that it should be waste to omit to put the premises into such repair as A B had put them in." We shall be met also by the cases of *Torriano v. Young* (a), *Horsefall v. Mather* (b), *Auworth v. Johnson* (c); but these were actions of assumpsit, and turned on the liability of tenants to repair, irrespective of express covenant, and they were Nisi Prius decisions.—[CRAMP-
 TON, J. Do not the declarations in all these cases charge negligence?—The law implies negligence if the fire be accidental, and accidental fire is a *tort* to both landlord and neighbours. *Hughes v. Sullivan*, in the Appendix to *Hayes and Jones's Reports*, p. 44, is the only case in Ireland on the point.—[BLACKBURN, C. J. But there is an element in that case which influenced the judgment of the Court; the defendant got £600 from the barony for the malicious burning.]—It does not, however, affect the principle: *Beale v. Sanders* (d); *Martin v. Gilham* (e). In that case an action for permissive waste was said to lie against a tenant from year to year: *Harnett v. Maitland* (f).—[MOORE, J. That case will not help you; because all that it decided was, that it was not inconsistent with the pleadings but that the tenancy might have been a tenancy at will, and a demurrer taken on the ground of its existence did not hold.]—A distinction may be pressed against us, that a tenancy for years differs from one from year to year.—[MOORE, J. It may be said that at the time of the Statute of Gloucester there was no such thing as a tenancy from year to year.]—*Agard v. King* (g) points out the distinction; and an anonymous case in the Year-books, 48 *Edw. 3, plac. 8*, p. 25, shows that a tenancy at will is negatived by the render of certain annual services, and that holding for a year certain, the tenant was liable for waste.

As to the second point, that an accidental fire is permissive

(a) 6 Car. & P. 12.

(b) Holt, N. P. Cas. 7.

(c) 5 Car. & P. 241.

(d) 5 Scott, 58; S. C. 3 Bing. N. C. 850.

(e) 7 Ad. & El. 540; S. C. 2 Nev. & P. 568.

(f) 16 M. & W. 257.

(g) Cro. Eliz. 775.

waste : *Com. Dig. Waste*, D, 2 ; 2 *Rolle Abridg. Waste*, C, 5 ; H. T. 1851.
"Si un maison soit ure per negligence ou mischance, ce est wast ; *Queen's Bench*
Vin. Abridg. Waste, I, plac. 4 ; *Bac. Abridg. Waste*, E, 5 ; *Co. Lit.* WHITE
 p. 53, a ; 1 *Wms. Saund.* p. 323, d. "Therefore after the statute v.
 "an action of waste might be brought against tenant for life, or M'CANN.
 "years, or even half a year, if his house was accidentally burnt by
 "fire, this being a species of negligent or permissive waste." 1 *Furl.*
L. & T., p. 492 :—"By the Common Law tenants were not answer-
 "able to their landlords for injuries caused by accidental fire ; but by
 "the Statute of Gloucester lessees for life and years were made liable,
 "as well for permissive as for voluntary waste ; and accidental
 "fire being considered negligent or permissive, it was settled that
 "tenants holding for life or years were subject to an action of waste
 "for such destruction." The recital of 2 G. 1, c. 5, is to this effect,
 that by the Common Law every person in whose house, chamber or
 out-house, any fire should accidentally happen, was compellable to
 make recompense and satisfaction for all damages suffered or occa-
 sioned thereby. That is a legislative declaration of the general
 liability of the tenant to his landlord in cases of fire. The relation
 of landlord and tenant imposes a certain duty to keep the premises
 in order, which does not arise in the case of a neighbour ; and why
 should the statute provide for the case of a neighbour, and omit
 the case of a landlord ? *Turbervil v. Stamp* (a) ; *Anonymous* (b) ;
Griffith's case (c) ; *Co. Lit.* p. 57, a.

On the third point, although the tenant be but tenant at will, yet,
 if the landlord be liable to his lessor on his covenant over, the
 tenant is liable to him. Here it is found by the special verdict that
 the plaintiffs are liable to Richard Pope their lessor : *Hicks v.*
Downing (d) ; *Jeremy v. Lowgar* (e) ; *Cudlipp v. Rundall* (f) ;
Countess of Shrewsbury's case (g). The principle of these cases is,
 that by the transfer of the mesne landlord's obligation to his tenant,
 in consideration of that the liability attaches.—[PERRIN, J. It does

(a) 1 Salk. 13.

(b) Cro. Eliz. 10.

(c) Sir F. Moore, 69.

(d) 1 Ld. Ray. 99.

(e) Cro. Eliz. 461.

(f) 4 Mod. 9.

(g) 5 Coke, 13, b.

H. T. 1851. not appear that the undertenant had any notice of the covenant.]
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 M'CANN. Fourthly, the question is unaffected by the Irish statute, which was studiously framed to exclude cases of landlord and tenant from its operation; 1 *Furl. L. & T.*, p. 493. "By the English statute "all persons are exempted from actions for injury caused by accidental fire in any house, except in case of special agreements "between landlord and tenant; but the law of Ireland in relation "to tenants has not been altered by the Irish Act, as all tenants are "in fact excluded from its operation." The 2nd section of the statute provides that nothing therein contained shall extend, or be construed to extend, to any action, covenant or agreement between landlord and tenant.

Lawson, O'Callaghan and D. Lynch, contra.

We admit a tenant for years is liable for permissive waste; but on the face of this record there is no permissive waste found; for the jury have affirmed that there was no negligence. "Accidental fire" includes different sorts of fire; it may be distinguished from wilful and malicious fire; it may be wilful without being malicious, or it may be inevitable; it may be evitable if by care or caution it might have been prevented; inevitable, if no care or caution would have prevented it. Fire occurring by accident and without negligence, or default on the part of the tenant, does not render him liable to an action, unless he have expressly contracted to repair; wherever he has been held liable, negligence is the ground of the action. The only passage like an authority against this position is that cited from 2 *Rolle. Abridg. Waste*, C, 6. The Statutes of Gloucester and Marlbridge do not alter the nature of waste: 2 *Inst.*, p. 300. "Neither the Statute of Gloucester nor the Statute of Marlbridge "doth create new kinds of wastes, but do give new remedies for old "waste; and what is waste, and what is not, must be determined by "the Common Law." Evitable accident—accident which the tenant by care could have guarded against—renders him liable; but he is excused by inevitable accident—that is, accident which in no respect is attributable to his default. In all of the cases negligence or want of care is the ground of the action; and where this is negatived, the

action fails: *Fleta*, Lib. C, 11, fol. 20; *Bracton*, Lib. 4, c. 18, fol. 317. Mischance, in the passage cited from *Rolle*, means an accident arising from want of due and proper care; and so the meaning of mischance is "*infortunium*"—misadventure: *Tomlyn's Law Dictionary*. In 1 *Bro. Ent.*, p. 29, the declaration was against the defendant for negligently keeping his fire. Special traverse, *actio non*—That the neighbouring house was set fire to and then the flames spread to defendant's house, *et per infortunium combussit, absque hoc*, that he so negligently kept his fire, &c. Every precedent contains the averment of negligence, and the inducement in that case must have furnished an answer to the action by showing that the defendant was not liable if there was no default of himself or his own people; *Fitzherbert's Abridg. Waste*, fol. 164, pl. 123. There the defendant, in answer to an action of waste, said the house was burned by mischance, by the default of a neighbour named R; and so in the case 48 *Edw. 3*, c. 25, it is expressly said from *default de garde* the fire occurred; and again, in *Fitzh. Abridg. Waste*, pl. 32, it was found at Nisi Prius that the house was burned by a boy of defendant's by want of care; and so in the Year-book, 2 *Hen. 4*, fol. 18, pl. 5, a man is bound to account for the act of his servant or his guest. Again, in *Liber Assissorum*, 42 *Edw. 3*, s. 9, p. 259, a man brings a writ against another for burning his house, who pleads not guilty; it was found by the verdict "*que le feu fuis illumine suddenment en la meason le def. il nient sachant et ard se biens*." On this verdict it was awarded that the plaintiff take nothing by his writ, but be in mercy. This shows that an accidental fire cannot render a defendant liable; default is necessary on the part of the tenant himself. In 1 *Rolle. Abridg.*, 273, it is said:—"If lessee for years of a house covenant to repair it, and afterwards certain sparks of fire came out of the chimney of the lessor, or a house not very remote, whereby the house of the lessee is burnt, this will excuse the performance of the covenant by the lessee": *Wakeman v. Robinson* (a). The same principle is laid down in the Civil Law: *Dig. Lib. 47*, tit. 9, pl. 11:—"When the law creates a duty, and the party is directed to perform it without any

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(a) 1 Bing. 213.

H. T. 1851. "default in him, and he has no remedy over, the law will excuse him,
Queen's Bench "as in waste, if a house be destroyed by tempest or enemies the
 WHITE "lessee is excused." "But when the party, by his own contract,
 v. "creates a duty or charge upon himself, he is bound to make it good,
 M'CANN. "notwithstanding any accident by inevitable necessity, because he
 "might have provided against it by his contract:" *Paradine v.*
Jane (a); 2 *Wms. Saund.*, p. 421, a. "For when the law creates
 "a duty, and the party is disabled to perform it without any default
 "in him, and he has no remedy over, the law will excuse him."
 Here the duty, if at all, is one implied by law, and the accident
 occurring inevitably absolves the defendant from such duty: *Bac.*
Abridg. tit. *Waste*, E, 391: *Dyer's Rep.* p. 33 a, pl. 10 & 11;
Co. Lit. 53, b; 2 *Inst.* pp. 145, 303; *Co. Lit.* 53, a. "If the
 house fall down by tempest or be burnt by lightning," &c. There
 is no distinction between an accident caused by lightning and any
 other cause which could not be guarded against; these are only put
 as instances in the books; the essence of the distinction is "default
 in the tenant," and that is negatived here.

It is said the recital in 2 *G.* 1, c. 5, disposes of this case; but the
 Court will not yield to a loose recital when the authorities are before
 it. The word "accidental" is used there not as excluding negli-
 gence, for negligence is expressly mentioned in the 4th section; but
 it is used in opposition to "designed," "wilful," or "intentional;"
 and the case of *Turberville v. Stamp* (b) shows this. There the
 Court say:—"The element of negligence is always essential;
 and where it is absent the defendant must be found not guilty."
 That was the last case decided before the analogous English
 statute. The case of *Hughes v. Sullivan* is not in point. The
 word there was "casualties." The action, too, was one of cove-
 nant, and the party had a remedy over, for he got £600 from the
 barony.

Then, is there any duty arising out of the relation of landlord and
 tenant in this case, which renders the defendant liable to an action
 for not repairing the damage thus occasioned? There is no com-
 plaint of this sort, and it is not found that the premises are not

(a) Aleyne Rep. 26.

(b) Comyn Rep. 33.

repaired. But the uniform current of authorities is against holding the tenant from year to year liable for permissive waste. *Horsfall v. Mather, Auworth v. Johnson, Gibson v. Wells, Torriano v. Young, Herne v. Bembow*, were all cases of tenancies from year to year; the deduction is, that tenant from year to year is only bound to keep the house wind and water tight, and is not liable for permissive waste. It need not be pressed the distinction between tenancies from year to year and tenancies at will; a tenancy at will rendering rent may exist. The proviso in the Irish statute refers to the case of a contract between landlord and tenant, and the word "actions" must be so understood.—[BLACKBURNE, C. J. If the former part of your argument be right, there is no necessity for you to rely on the statute; but may not the word "action" in the statute mean remedy?—CRAMPTON, J. It may mean a right of action.]—If that word were out of the statute, there could be no question in the case as far as it is concerned. The action of waste must be brought by one having a sufficient interest to sustain it. Originally it could only be brought by one having an estate of inheritance; but that is now modified.

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J. E. Walsh (in the absence of *Martley*) replied, and cited *Viscount Canterbury v. The Attorney-General* (a).

Cur. ad. vult.

BLACKBURNE, C. J., delivered judgment.

This case, which involves a question of very great importance, has been very ably argued, and we have arrived at the conclusion that judgment should be given for the defendant.

Jan. 30.

It is an action on the case in the nature of waste, brought against the defendant as tenant from year to year, the waste being the destruction of the demised premises by fire. The declaration contains three counts, each of which contains a statement of a covenant of the plaintiff, who immediately holds the premises, to keep them in repair; and the special verdict finds the lease under which he holds, and that it contains a covenant to that effect.

(a) 1 Phil. 306.

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It does not appear to us that the plaintiff can derive any right to maintain the present action from the liability to which he may be exposed as the consequence of the destruction of the premises. That consideration might be very material, if the plaintiff had been able to adduce evidence of a contract by the defendant to indemnify him by keeping the premises in repair; but no such question can arise in this action, which is founded on a *tort*, and in which we have to decide whether the *torts* alleged in the declaration, or any of them, are found to have been committed by the defendant? The allegations of waste, contained in the first and second counts, need not be stated, for it has not been contended that they are sustainable, if those of the third count be not.

The question is, therefore, confined to the latter, which is in these words:—"That the defendants, not regarding their duty in that behalf, wrongfully and injuriously suffered and permitted the premises to be burned down and destroyed by fire." This is a charge of permissive waste, for which, if proved, we think the plaintiff could maintain this action. The finding of the jury is, "that there was no negligence on the part of the defendant to occasion the fire, but that the same occurred by accident." The question is, does this finding prove the above allegation? The meaning of which I consider to be plainly this, that the defendant was under a duty which he wrongfully neglected to perform, and that by neglecting to perform it, he permitted and suffered—that is, as I would say, caused and occasioned the destruction of the premises by fire. When the jury find that there was no negligence, the alleged breach of duty is negatived; and when they find, as they do, that the fire was occasioned by accident alone, they further negative and disprove the charge that it was caused by any breach of the defendant's duty. I cannot therefore see any room to doubt that the case stated by the plaintiff is disproved by the facts found by the special verdict.

But it is contended by the plaintiffs that the Statute of Gloucester having made tenants for years liable for permissive waste, it is immaterial whether the premises were destroyed by accident or negligence. I may observe of this argument, that it is both unreasonable and inconvenient to call on us to decide such a question in

the abstract, and to reject as immaterial and unnecessary the allegations which impute wrong and breach of duty to the defendant. These allegations I cannot regard as mere surplusage; on the contrary, they are found in the form suggested by Sergeant *Williams*, in 2 *Saund.*, p. 252, as proper in cases of permissive waste; which form, it will be seen, deals with the subject of the action as one involving a breach of duty. But there is no authority or position that the accidental destruction of premises amounts to permissive waste, or to a *tort* on the part of a tenant. In *Co. Lit.*, p. 53, is this passage:—"Burning the house by negligence or mischance is waste." I should strongly infer from this that burning the house, if not by negligence, is not waste; and this view of it is confirmed by Lord Coke, citing in a subsequent part of the same page the passage from *Fleta*, which has been so much observed on:—"Fortuna autem et ignis vel hujusmodi eventus in inopinati omnes tenentes excusant." Mr. *Hargrave* appears by his note to treat both these positions, as they plainly are, in *pari materia*, and the result is that negligence is the cause of the tenant's liability, and that mere accident does not make him constructively guilty of permitting or suffering the premises to be consumed by fire. I would draw the same conclusion from the words of the Statute of Marlbridge, "*non faciunt eastum*;" and the exposition of these in 1 *Inst.*, p. 145:—"To do or make waste, includes as well permissive waste, which is waste by reason of omission, or not doing (as for want of reparation), as waste by reason of commission, as to cut down trees, or prostrate houses, or the like; and the same word hath the Statute of Gloucester, *que aver fait waste*, and yet is understood of passive as well as of active waste; for he that suffereth a house to decay which he ought to repair doth the waste." All these passages and phrases point to the omission of acts which it was the tenant's duty to do, and which wrongful omission causes the injury complained of. They therefore seem to be quite at variance with the notion, that where the injury is the sole result of accident, and there is no neglect of duty, the waste can be permissive.

Judgment for the defendants.

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THE QUEEN,
 At the relation of JOHN SHEEHY,
 v.
 ROBERT MACMAHON.

Jan. 30.

Where at a municipal election for the office of Alderman, votes not properly entered on the burgess roll had been received and recorded, with the assent of a burgess who was canvassing for the office; *Held*, that by his assent to the reception of such votes he thereby disqualified himself from objecting to their legality on an application for an information in the nature of a *quo warranto*.

A CONDITIONAL order had been obtained on behalf of the relator for liberty to file an information, in the nature of a *quo warranto*, against Robert Macmahon, to show by what authority he exercised the office of Alderman of the borough of Limerick.

The affidavit of the relator stated that he was a burgess of the borough of Limerick; that at the annual municipal election of burgesses for said borough in November 1850, he and the defendant were candidates for the vacant office of Alderman; that on that election John Baird voted as a burgess for Robert Macmahon, and his vote was recorded, although his name was not on the burgess roll; but that the name of Baird, Goodwin and Co. appeared on the roll, and John Baird was allowed to record his vote as a member of that firm. The affidavit stated a similar objection to the vote of one William Curtis, who had, as a member of the firm of Evans, Curtis and Co., voted for the defendant as an Alderman; and it specified two other votes which were received, similarly circumstanced. The defendant was declared duly elected by a casting vote.

The affidavit of the defendant, filed as cause against the order, admitted that the votes were received in the manner stated; but that although the name of John Baird and the others did not appear in terms on the roll, they were so in substance, and that the presiding Aldermen were satisfied that John Baird and the others were the persons who appeared as a burgess under the respective names of John Baird and Co., Evans, Curtis and Co., and the other firms. That Baird's vote was received in the presence of the relator, with his full knowledge of the fact of that name not being on the burgess roll otherwise than as John Baird and Co., and also with a full

knowledge that John Baird was a partner of said firm, and that the relator made no objection to his vote being recorded. That it appeared by the rate-book and valuation that John Baird and Co. were valued and rated to a large amount within the borough, and submitted that as such member of the firm John Baird was entitled to vote as a burgess. That the said John Baird and the other voters, objected to by the relator, were respectively canvassed by him previous to the election to give their votes as burgesses, and to support him as a candidate for the office of Alderman of the borough. That even supposing this objection could be sustained, several persons, whose votes were open to a similar objection as that alleged against Baird and the others, had voted for the relator at said election.

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Fitzgibbon (with him *J. D. Fitzgerald*) moved to make this order for the *quo warranto* absolute. These votes are clearly bad; not only must the burgess, to entitle him to vote, appear by name on the roll, but he must be an occupier, and rated by name as such; all these must concur to give him qualification. The relator could not object at the revision to a firm, because the party objected to might say he was not on the roll. The Court will not on answering affidavits, enter into the validity of the votes on either side: *Regina v. Byrne* (a). We have a majority of one vote.—[BLACKBURN, C. J. The objections are to the lists, not to the burgess roll.]—The one is a transcript of the other.

Martley and Sir *C. O'Loghlen*, contra.

The relator has acquiesced in the list, and cannot now object to it. That case of *Regina v. Byrne* was rested on a mistaken view of *The Queen v. Quayle* (b). A person applying for a *quo warranto* must show that some other party had a better right to be elected than the one to be removed: *The King v. Parry* (c). Every one of these persons here objected to was duly qualified, and the relator cannot now object to them, as he was present at the election, and made no protest. He must be presumed to have been entirely

(a) 4 Ir. Law Rep. 273.

(b) 11 Ad. & Ell. 508.

(c) 6 Ad. & Ell. 810.

H. T. 1851. cognisant of the burgess list, and yet he did not once object, but acquiesced in the reception of the votes, and thus adopted the list :
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THE QUEEN *The Queen v. Greene (a)*; *The King v. Trevenen (b)*; there it was
v.
MACMAHON. held, that the relator having concurred in the election was a fatal objection to an application for a *quo warranto*. So in *The King v. Parkyn (c)*; *Rex v. Martlock (d)*; *Rex v. Cudlipp (e)*; there the application was refused, because the relator's title was subject to the same defect as that of the defendant: *Rex v. Braehen (f)*; *Rex v. Marten (g)*. The affidavit of the relator admits he was present during the time the votes were given.—[MOORE, J. Was any question of identity put to the voters?—That is not necessary unless required by the objector. The application for a *quo warranto* is discretionary with the Court; and if the relator by his conduct disentitle himself to the remedy, the Court will not aid him.

J. D. Fitzgerald replied.

Admittedly this application is to the discretion of the Court; but the Court will not refuse a *quo warranto* because of the acquiescence of the relators at the poll. In the case of *Rex v. Marten*, the Court say the relators come to complain of their own iniquity; and unquestionably if a relator do not appear with clean hands, the Court will not hear him. Here there is no acquiescence, unless it be implied from the relator making no objection at the time of the election.—[MOORE, J. But you have accepted the benefit of two votes open to the same objection as you rely on.]—If the case depended on them the Court must refuse the application.—[MOORE, J. If a man, aware of a legal objection to a vote, take his chance of the poll, and being defeated, turn round and rely on the objection, I would consider it *mala fides*.]—If an objection be made, there is an officer appointed by the Municipal Act to receive and decide it; and the 3 & 4 Vic. c. 108, s. 66, precludes any objection being made at the election, except those specified in the section, of which this is

(a) 2 Gal. & Dav. 24.

(b) 2 B. & Ald. 339.

(c) 1 B. & Ad. 690.

(d) 3 T. R. 300.

(e) 6 T. R. 508.

(f) Alc. & Nap. 113.

(g) 4 Burr. 2120.

not one. The sole inquiries to be made are:—"Are you the person whose name is signed as A B to the voting-paper now delivered in by you?—Are you the person whose name appears as A B on the burgess roll now in force for this borough, being registered therein for property described to be situated in, &c.?—Have you already voted at the present election in this or any other ward?"—[PERRIN, J. Here is one name, J. Remington and Company, how can the voter answer the question, "are you that person?"]—A person must be an occupier and rated as such. Remington and Company are rated as a company; but how can we tell whether John Remington is rated or not? or whether he is the occupier? *Rex v. Bracken* was a case where the relator was impeaching the very board by whom he had been elected, and the Court held he could not be heard to dispute the authority which elected him: *Rex v. Green* was a case where the relator was guilty of an act which induced the other party to assume an office to which he had no right.

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This is an application addressed to the discretion of the Court, and in all such cases the judgment of the Court must be regulated by the merits and conduct of the parties. It is plain these votes were bad, not having a proper Christian and surname attached. There is no doubt that the relator had full knowledge of every fact brought forward on the present motion, and of this particular objection existing; not only that, but he actually canvassed for the votes he now objects to, and polled others liable to a similar objection. He takes his chance at the election, and in that state of things he is not now to be heard raising that objection which he before consented to suppress. We ought not therefore at his instance to hear this motion. We decide the motion on the ground of the relator's acquiescence and his full knowledge of the objection. My opinion, however, is not free from doubt.

Cause allowed, without costs.

M. T. 1850.
Queen's Bench

EMILY J. CRAWFORD,
 Administratrix of JOHN CRAWFORD,

v.

RICHARD WHEARTY.

Nov. 22.

To an action of covenant by administratrix of lessor against lessee, defendant (*inter alia*) pleaded that one G. H. was the owner of the premises for the term mentioned, and that the lessor after his death became possessed thereof as his executor, and was so possessed to the time of making the indenture; that the lessor died intestate, and that plaintiff was his administratrix, and that M. L. obtained administration *de bonis non* to G. H. Held bad on special demurrer, the defendant being estopped by his covenant to pay the rent, denying that plaintiff was entitled to maintain the action.

COVENANT.—The declaration stated that John Crawford, since deceased, before and at the time of the making of the indenture of demise thereafter mentioned, was lawfully possessed of the tenements, &c., mentioned to have been demised to the defendant for the residue of a term of 999 years, commencing from the 1st of November 1781, to come and unexpired therein, to wit, at &c.; and being so possessed, the said John Crawford in his lifetime, to wit, in &c., at &c., by a certain indenture then and there made between John Crawford of the one part, and the defendant of the other part (*Profert*), John Crawford demised unto the defendant, his executors, administrators and assigns, a certain messuage, &c. *Habendum* to the defendant, his executors, &c., for the term of fifty-one years, yielding, &c., unto John Crawford, his executors, administrators or assigns, £21 yearly, to be paid by four even and equal quarterly payments, &c. Averment that the defendant did thereby for himself, his heirs, executors, &c., covenant, &c., to and with John Crawford, his executors, administrators and assigns, that he and they would pay the rent, &c.; by virtue of which demise the defendant afterwards, to wit &c., entered into and upon all and singular the demised premises, and became and was possessed thereof for the said term.

The declaration then stated that John Crawford being so possessed of said reversion, and during said term, died intestate; and that on the 10th of June 1847, administration was granted to the plaintiff of his goods, "whereby the plaintiff, as administratrix "aforesaid, became and was possessed of the said reversion of and "in the said demised premises, with the appurtenances," &c.; and

that "after the making of the said indenture, and during the term
 "thereby granted, and after the death of John Crawford, to wit on
 "the 1st day of May, A. D. 1850, to wit, at &c., the sum of £31. 10s.
 "of the rent aforesaid, for one year and a-half of the term, ending
 "on the day and year last aforesaid, and then elapsed, became and
 "was due," &c.

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Queen's Bench
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v.
 WHEARTY.

Breach, non-payment of the rent.

Pleas—first, *non est factum* ; secondly, *actionem non* ; because he saith that John Crawford was not at the time of the making of the indenture of demise of the 2nd of November 1838, or at any time afterwards, possessed of the messuage, &c., *modo et formâ* as in the declaration alleged, concluding to the country.

Third—*actionem non* ; because he says that heretofore and before the commencement of this suit, and before the making of the indenture of demise in the declaration mentioned, to wit on the 1st day of January, A. D. 1838, to wit, at &c., one George Holmes, since deceased, was lawfully possessed of the tenements, &c., for the residue of a term of years ; that is to say, for the residue of a term of 999 years, commencing from the 1st day of November 1781 to come and unexpired, &c., being the term of 999 years in the declaration mentioned, to wit, at &c. ; and the said George Holmes being so possessed, afterwards and before the making of the indenture of demise in the declaration mentioned, and before the commencement, &c., to wit, &c., duly made and published his last will and testament in writing, and thereby named, and thereof appointed, one John Crawford, in the declaration named, to be the executor ; and the said George Holmes afterwards, and before the making of the indenture of demise, &c., and whilst he was so possessed of said tenements, &c., for the residue of the term aforesaid, died without having altered or revoked his said will.

The plea then alleged that before the making of the indenture, the will of George Holmes was proved by John Crawford, and he
 • thereby became the legal personal representative of George Holmes ; and that as such executor and personal representative, he then and there became and was lawfully possessed of the residue of the term of 999 years in said declaration mentioned ; that John Crawford

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afterwards and after the making of the indenture of demise, and before the breach of covenant, John Crawford died intestate; and "afterwards and before the committing of the breach of covenant in "said declaration mentioned, and before the commencement of this "action, to wit, on &c., one Mary Lynch duly obtained forth of her "Majesty's Court of Prerogative in Ireland administration to be "granted to her of all the goods and chattels, &c., of the aforesaid "George Holmes, which were left unadministered by the said John "Crawford deceased, which said administration is still in force and "undetermined;" and that Mary Lynch then and there became and was and is the legal personal representative of George Holmes, and became, and was, and is, lawfully possessed of the tenements in the declaration mentioned for the residue of the term, &c., in reversion expectant upon the determination of the term of fifty-one years.—

Verification.

Replication, *similiter* to first and second pleas.

Special demurrer to the third plea, that it did not traverse, or deny, or attempt to put in issue, any matter of fact alleged by the plaintiff; but had introduced and attempted to put in issue matters of fact not by him alleged; that the plea was no answer to the declaration, but was evasive and argumentative; and also that inasmuch as the defendant was a party to the indenture of demise in the declaration mentioned, whereby he covenanted to pay the yearly rent, he was estopped from disputing the plaintiff's right to the rent; and also that the plea amounted to *nil habuit in tenementis*, and could not be pleaded by the defendant, being a party to the indenture of demise.

Joinder in demurrer.

Perrin, with him *D. Lynch*, for the demurrer, referred to 2 *Wms. on Executors*, 3rd ed.:—"If an executor or administrator makes an "underlease of a term of years of the deceased, rendering rent to "himself, his executors, &c., though he has the term wholly in right "of the intestate, yet when he makes this lease he has power to dis- "pose of the whole; and by making a lease of part, he appropriates "that to himself, and divides it from the rest, and has the rent in

"his own right; and if he brings an action for it, he must bring it
 "in the *debet* and *detinet*; and if he dies, the rent will be payable to
 "his personal representative, and not to the *administrator de bonis*
 "non of the original deceased:" *Drue v. Baylye* (a); 1 *Wms. on* M. T. 1850.
Executors, p. 730, 3rd ed. Queen's Bench
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Lawless, contra, referred to *Isherwood v. Oldknow* (b); *Tingrey*
v. Brown (c); *Catherwood v. Chabaud* (d); *Hirst, Administrator*
Hirst, v. Smith (e).

Lynck replied, relying on *Kelly v. Shaw*,* decided in this Court
 in Trinity Term 1849.

BLACKBURN, C. J.

That case rules this demurrer, which must be allowed.

(a) 1 *Freem.* 403.

(b) 3 *M. & Sel.* 382.

(c) 1 *Bos. & Pull.* 310.

(d) 1 *B. & C.* 150.

(e) 7 *T. R.* 182.

* LAVINIA KELLY, Administratrix of ELEANOR KELLY,

v.

HENRY SHAW.

May 25.
 June 1.

COVENANT.—The declaration stated that in the lifetime of Eleanor Kelly, she was possessed of a certain messuage and tenement for the residue of a term of one hundred years, of which sixty were unex-

A declaration in covenant by administratrix of lessor against assignee of lessee,

stated that one E. K., being possessed of the demised premises for the remainder of a term of years, of which sixty and upwards were unexpired, by indenture demised the same to defendant, who covenanted to pay the rent; that E. K. died, and letters of administration of the goods of E. K. were granted to the plaintiff, by reason whereof he became and was and still is possessed of the reversion.

Plea.—That E. K. had nothing in the premises except through R. K., deceased, and that before E. K. was possessed the said R. K. was possessed for the residue of the term, and so continued up to and at his death; and being so possessed R. K.

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pired; and being so possessed, by indenture (*Profert*) she demised the same to Michael Doyle, *Habendum*, for the said term of sixty years, at a yearly rent of £30. It then set out a covenant, whereby Doyle, for himself, his executors, administrators and assigns, covenanted with Eleanor Kelly, her executors, administrators and assigns, from time to time during the term, to pay the rent. That Doyle entered and became possessed of the premises, the reversion thereof with the appurtenances belonging to Eleanor Kelly.

It then averred the death of Eleanor Kelly intestate, and that administration of her goods and chattels was granted to the plaintiff, by reason whereof the plaintiff became, and was and still is possessed of the reversion. And that Michael Doyle being so possessed, all his estate vested by assignment in the defendant.

It then alleged that a year's rent was due on the 1st of September 1847, and averred as a breach non-payment of the same.

Plea—*Actionem non*, because he says that the said Eleanor Kelly has nothing in the said messuage and premises save and except through and under one Richard Kelly, deceased; and before the said Eleanor Kelly was possessed of the said messuage and premises, to wit on the 1st day of January 1820, to wit, at &c., the said Richard Kelly was possessed thereof for the residue then to come and unexpired of and in the said messuage, with the appurtenances, and thence continued possessed thereof until and at the time of his death, and being so possessed afterwards, to wit, on &c., at &c., the said Richard Kelly died, and after his death, to wit, on &c., administration, &c., of the said Richard Kelly was duly granted to the said Eleanor Kelly forth of the Consistorial Court of the diocese of Dublin, within which diocese the said messuage and premises are situate, whereby the said Eleanor as such administratrix, and not

died, and letters of administration were granted to E. K., whereby E. K., as administratrix and not otherwise, became and was possessed of the premises, and so continued up to and at the making of the indenture, and that she died, and all her estate and interest thereby determined.—*Held*, a bad plea, the averment as to the determination of the term and estate being repugnant to law, and being further defective in not averring there was any *administration de bonis non*.

Held also, that the plaintiff as administratrix was entitled to maintain the action, even though E. K. had the term as administratrix, there being an express covenant to pay the rent, which runs with the land, and binds the assignee of the lease.

Drue v. Bayly (Freem. Rep.) is sound law.

otherwise, then and there became and was possessed of the said messuage and premises, &c., for the said term, and continued and was possessed thereof as such administratrix, and not otherwise, up to and until and at the time of the making of said indenture of lease: and the plaintiff saith that after the making of said indenture of lease, and before the breach of covenant in said declaration mentioned, to wit, on &c., at &c., the said Eleanor Kelly died, and thereupon and thereby all her estate, term and interest of and in the said messuage and premises, &c., ceased and determined.—
Verification.

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Second plea, that before the breach of covenant, to wit &c., by a certain indenture of assignment then and there made and duly signed by the defendant and sealed with his seal, he (the defendant), for the consideration therein mentioned, did bargain, sell, assign, transfer and set over unto one William Shaw, his executors, &c., all the right, title, &c., of him (the said defendant), of and in the said messuage and premises, &c. *Habendum*, unto the said William Shaw, his executors, &c., for the residue of said term. *Virtute cujus* William Shaw afterwards, and before the breach of covenant, entered and became and was possessed of the said messuage and premises, &c.

Third plea, that defendant paid to the plaintiff and received a sum of money in full satisfaction and discharge of said demand.

Fourth plea, a set-off.

Replication to the first plea, that Eleanor Kelly was not at the time of the making of the indenture of lease possessed of the premises as administratrix of Richard Kelly, and not otherwise, *modo et formâ*.

Replication to the second plea, a traverse of the assignment to William Shaw *modo et formâ*.

Replication to the third plea, a denial of the satisfaction, and to the fourth plea a denial of the set-off.

Special demurrer to the replication to the first plea, assigning as cause that the matter attempted to be put in issue by the replication was an inference of law resulting from the facts, and not traversed by the replication; that it was uncertain whether

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the plaintiff intended to deny that Eleanor Kelly was administratrix of Michael Kelly; or admitting she was such administratrix, to allege that she had some other and different title to the premises; that it did not show how or for what estate Eleanor Kelly was possessed other than as administratrix; that it was double, in traversing that she was administratrix, and also that she was not otherwise possessed; that it traversed by a negative, a negative allegation, and that the traverse was too wide.

Similiter to the replication to second, third and fourth pleas.
 Joinder in demurrer.

Meagher and *O'Leary*, for the demurrer.

Hayes and *Napier*, contra.

Cur. ad. vult.

BLACKBURN, C. J.

June 1.

This case comes before the Court on a demurrer to the replication, and on the argument the plaintiff contended that the first plea was bad.

This is an action of covenant for rent by the administratrix of the lessor against the assignee of the lessee. The declaration states that the intestate, Eleanor Kelly, was possessed of the demised premises for the remainder of a term of years, to wit a term of one hundred years, of which sixty and upwards were unexpired, and being so possessed, made the indenture of demise which it sets forth, containing the covenant declared on. That Eleanor Kelly died intestate; that letters of administration were granted to the plaintiff, by reason whereof she became and was and still is possessed of said reversion.

The defendant pleaded that Eleanor Kelly *has* nothing in the premises save and except through Richard Kelly, deceased. I must observe that this is a very incorrect mode of pleading. The mistakes are of such a character, that I doubt whether a special demurrer would not be allowed, or the pleading taken off the file. It then goes on to state, and before the said Eleanor was possessed

of the premises the said Richard was possessed thereof for the residue then to come and unexpired of and in the said premises, and then continued so possessed until and at the time of his death ; and being so possessed the said Richard Kelly died, and after his death administration of his goods, &c., was granted to Eleanor Kelly by the Consistorial Court of the diocese of Dublin, whereby she, as such administratrix, and not otherwise, then and there became and was possessed of the premises for the same term, and continued and was possessed thereof as such administratrix, and not otherwise, up to and at the time of the making of the said indenture of lease, and that she afterwards died, whereby all her estate and term in the said premises ceased and determined.

This averment of the determination of the estate and term is directly repugnant to law ; for no matter who is indebted, the rent is due and payable, and there is no determination of the term. This statement is further defective in not averring that there is any administrator *de bonis non* ; there never may be one, and never will be one, if the assets be administered.

The replication is, that Eleanor Kelly was not, at the time of the making of the said indenture of lease, possessed of the premises for the said term as administratrix of Richard Kelly, and not otherwise, as in plea alleged.

If the right of the plaintiff to recover in this action depended on the result of the question, whether Eleanor Kelly had this term *sua jure*, or as administratrix, it might be necessary to inquire whether the issue tendered by the replication was proper ; and further, whether the plea ought to have taken issue on the averment that Eleanor Kelly was possessed for the residue of a term *modo et forma* ?—that is, in her own right ; but such issues would be immaterial if the plaintiff have a right to recover, even though Eleanor Kelly had the term as administratrix, and the plaintiff contended that he has that right to recover.

The defence made by this plea is, that the title of Eleanor Kelly, the administratrix who made the lease, is at an end, and that the plaintiff, as her representative, cannot maintain this action. If this argument be well founded, it will follow that, though the lease assigned to the defendant is subsisting, and though the covenant in it is to

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pay the rent during the term, yet that no rent can be recovered from the defendant or from the original lessee; for whatever be the law as to the right to recover, it is perfectly plain that the administrator *de bonis non* cannot do so, his title being paramount to that of the person who made the lease; the rent must therefore be lost if the plaintiff cannot recover it. The case of *Drue v. Baylye* (a) appears to be a clear authority in support of the plaintiff's right to recover. That was debt on bond for the performance of a covenant to pay rent reserved on a lease made by an administrator of a part of certain lands held by him in that right for a term of years. The report says that the only question was, whether the executor of the lessor had a right to the rents? for it was admitted that this being a covenant for payment of the rent, if the rent is gone, so are the bond and covenant.

It was argued that the rent went with the reversion to the administrator *de bonis non*, and that if the defendant were liable to the executor of the lessee, he would be doubly charged. Hale, C. J., in giving judgment, says:—"That the administrator had in him "a double capacity when he made the lease, one in his own right, "and the other in right of the intestate; and though he hath this "term wholly in right of the intestate, yet when he made the "lease he had power to dispose of the whole; and by making "a lease of part, he doth appropriate that to himself, and divides "it from the rest, and hath the rent in his own right; and if "he brings an action for it, it must be in the *debit* and *debitus*, as "when he sells a house and sues for the money; and so having "the rent in his own right, the administrator *de bonis non* cannot "claim it, because he comes in by title paramount." Again, he says:—"The rent reserved to the administrator and his executor is a continuing interest in them in the same right." This position directly contradicts the assertion of the plea, that all the estate of the lessor in the premises ceased.

It is impossible from this and other passages of the judgment to deny its application to the case before us, or that it is a decision that the rent belongs to the plaintiff; the consequence of which is, that he can recover on the express covenant to pay it, which runs

(a) 1 Freem. 404.

with the estate, and binds the defendant as assignee of the lease. T. T. 1849.
 Whatever may be the value of the remarks made by the defendant's Queen's Bench
 Counsel on other passages of this judgment, it is the decision of a KELLY
 Court and Judge of the greatest authority. It is not impugned by v.
 any other decision; it is stated by *Williams*, in his book on *Executors*, as law, without reference to any case or doctrine questioning SHAW.
 it; and it appears to me to be sustained in principle by those cases which decide that present rights have been and may be acquired by an executor or administrator against third persons, by virtue of dealings and contracts respecting the assets of the testator or intestate. I allude to the cases of *Sheffington v. Budd (a)*, *Curbois v. Brereton (b)*.

For these reasons, the plea being bad, judgment must be for the plaintiff.

CRAMPTON, J.

I shall make but one observation in addition to what has been stated by my LORD CHIEF JUSTICE.

The declaration avers that the plaintiff became possessed of the reversion of the term; and the plea does not allege a reversion to be in any other person whatsoever; there is nothing like a direct traverse of that fact, or of that declaration of law, if it be a declaration of law; on the contrary, the averment is, that the interest of Eleanor Kelly ceased on her death. That position is not maintainable in point of law, because, although the reversion may not be in the administratrix after making the lease, yet the rent is in the administratrix.

In addition, there is no allegation of a reversion in any one outside the plaintiff. She might have been a legatee or sole next-of-kin as well as administratrix, and all the assets may have been disposed of.

PERMAN, J., and MOORE, J., concurred.

Judgment for the plaintiff.

(a) 9 Cl. & Fin. 248.

(b) 2 Jones, 397.

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FRENCH v. CAHILL.

Jan. 25.

To a declaration in assumpsit the defendant pleaded the general issue, and a set-off as to part. Issue was joined on the first plea, and to the second plea plaintiff replied specially. To this special replication the defendant demurred, and the demurrer was allowed. Pending the arguments on the demurrer the issue in fact was tried, and a verdict found for the plaintiff for a sum less than that included in the plea of set-off. *Held*, that under such circumstances the plaintiff was not entitled to the costs of the trial.

THIS was a motion on the part of the plaintiff that the officer do review his taxation. The case was an action for use and occupation, and the declaration contained the ordinary count in assumpsit for use and occupation, and the money counts.

The defendant pleaded non-assumpsit; and secondly, that the plaintiff, before and at the time of exhibiting his bill was, and still is, indebted to the defendant in the sum of £39, upon and by virtue of a judgment recovered by the defendant against the plaintiff, and in other sums of money, which he was willing to set off against the claim of the plaintiff.

Replication, as to so much of the plea as relates to the £39; that after the making of the promise, and before the recovery of the judgment, to wit, on &c., the plaintiff had issued a *capias ad respondendum* to answer the plaintiff of a plea of trespass, and that said writ was sued out with intent to implead the defendant for the causes of action in the declaration; that accordingly the plaintiff afterwards, in Michaelmas Term, exhibited his bill, and declared thereon against the defendant, and that he therefore was not indebted to the defendant on foot of said judgment, or in any sum at the time of action brought; and as to the residue of said plea, that he was not indebted *modo et forma, &c.*

To so much of the replication as related to the £39 the defendant demurred, and the demurrer was allowed* in last Michaelmas Term. The issues in fact raised by the pleadings had been tried pending

* As the question on argument of this demurrer turned solely on the point whether, for the purpose of the plea, the issuing of the writ or the filing of the declaration was to be considered the commencement of the action, and as that question has been set at rest by the Practice and Process Act, the issuing of the summons being for all purposes the commencement of the action, the Reporters have deemed it unnecessary to report it.

the demurrer, and a verdict was found for the plaintiff for a sum less than that included in the plea of set-off. The Master on that state of facts refused to allow the plaintiff the costs of the trial of the issues in fact.

H. T. 1851.
Queen's Bench
 FRENCH
 v.
 CAHILL.

Isidore Blake, in support of the motion:

Where several issues are joined, each party is entitled to the costs of the issues on which he succeeds, and notwithstanding the pendency of the demurrer, the plaintiff is entitled to have the issues in fact tried, and these issues being found in his favour, he is entitled to the costs: *Bull. N. P.* p. 335; *Jones v. Davies* (a); *Duberley v. Page* (b); *Hart v. Cutbush* (c).—[MOORE, J. Have you any authority to show that a plaintiff is entitled to the costs of an issue when he has no cause of action?]*Bird v. Higginson* (d). In that case the declaration contained two counts, and the defendant pleaded two pleas to the first count—and one to the second; issues were joined on one plea to the first count, and on the plea to the second count; the other plea to the first count was demurred to. The plaintiff took the issues of fact to trial, and a verdict was found for him on the issue on the first count, and damages assessed; and for the defendant on the issue on the second count. Afterwards, on the demurrer to the other plea to the first count, the defendant had judgment; and it was held under these circumstances that the plaintiff was entitled to all the costs of the trial on the issue on which he had succeeded.

In that case Lord Denman reviews all the cases on this subject: and states that they show the construction and practice on the statute of *Anne* has been to give the plaintiff his costs on issues found for him, whether they be issues of fact or issues of law, even though upon the other issues the judgment be such as that the defendant has judgment on the whole record. The 4 *Anne*, c. 16 (*Eng.*), is the analogous Act to 6 *Anne*, c. 10 (*Ir.*).

(a) *Barnes*, 140.

(c) 2 D. P. C. 456.
 VOL. I

(b) 2 T. R. 391.

(d) 5 Ad. & El. 83.
 30 L

H. T. 1851.

*Queen's Bench*FRENCH
v.

CAHILL.

Concannon, contra.

Bird v. Higginson does not govern this case, for it was decided on a rule that does not exist here, and the same questions did not arise; the pleas there went to the whole cause of action; here there was no plea going to the whole cause of action; the general issue is a divisible plea.—[BLACKBURNE, C. J. The defendant here was obliged to go to trial and succeeded in reducing the plaintiff's demand below the amount of the set-off.]—The party substantially succeeding is not bound to pay the costs of the issues upon which he fails: *Probert v. Phillips* (a); *Cousins v. Paddon* (b); *Card in replevin v. Bourne* (c). It was there held that the party who substantially succeeds on a trial is not liable to pay further costs incident to issues upon which he has failed, when the case is substantially single, than those attendant upon the increased pleading.

Per Curiam.

Refuse the motion, with costs.

(a) 5 D. P. C. 473.

(b) 4 D. P. C. 488.

(c) 5 Law Rec. N. S. 25.

H. T. 1851.
Queen's Bench

EDWARD GALWEY, Administrator of JOHN GALWEY,

v.

STEPHEN O'MEAGHER.

Jan. 17.

DEBT for rent.—The first count of the declaration stated that the Rev. John Galwey (deceased), on the 24th of June 1829, at Clonbeg, in the county Tipperary, to wit, at Castle-street, in the county of the city of Dublin, being then and there rector and incumbent of the parish of Killadriffe, in the county of Tipperary, demised to Denis O'Meagher, the father of the defendant, certain lands, &c., in said parish; *Habendum*, to the said Denis O'Meagher, his executors, &c., for ninety-nine years, provided the incumbency of the said John Galwey should so long continue, yielding and paying thereout during the term unto John Galwey the yearly rent of £22. 15s. 9d., by half-yearly payments, every 24th of June and 24th of December. The count then averred the entry of Denis O'Meagher under this demise, and that the estate and interest vested in the defendant by assignment. *Breach*, non-payment by the defendant to John Galwey, or to plaintiff as his administrator, of one and a-half year's rent, due to John Galwey in his lifetime.

The second count stated, and whereas also heretofore, to wit on the 10th day of February in the year 1827, to wit, at &c., pursuant to the statutes then in force for the establishment of compositions for tithes in Ireland, a certain composition for all tithes payable within the parish of Killadriffe, in the county of Tipperary, to wit &c., was duly made and the entire annual amount of said composition was then and there duly ascertained and fixed by a certain certificate then and there duly made and signed by certain Commissioners in that behalf duly appointed, and the entire annual amount of said composition was in and by said certificate certified to be payable to the said Rev. John Galwey as a composition for the tithes of the said parish claimable by him as rector of said parish; and afterwards,

In an action of debt for tithe rentcharge, the declaration averred that the defendant had in the lands an estate of inheritance within the meaning of the Act of Parliament (1 & 2 Vic. c. 109), under which and derived wherefrom there was not any such estate of inheritance, or other estate or interest as in and by the Act is defined to be a perpetual estate or interest for the purposes of said Act. *Held*, bad on demurrer, as the count should have expressly negatived all the exceptions contained in the Act of Parliament.

Held also, that in such action the venue is transitory.

H. T. 1851.
Queen's Bench
 GALWEY
 v.
 O'MEAGHER.

to wit, on &c., at &c., the same was duly assessed and applotted on all the titheable lands of and within the said parish, and said applotment was then and there duly signed by the Commissioners, and upon certain parcels of said titheable lands, to wit [setting out the lands] then was duly assessed and applotted in manner and at the time and place aforesaid, a certain annual sum, to wit the annual sum of £60. 7s. 8d., being parcel of the annual amount of said composition, and payable to the rector for the time being of said parish, and afterwards, to wit, on the 1st day of November, in the year of our Lord 1849, and for a long space of time, to wit for the space of six years ending on that day, and before then elapsed; and after the passing of the Act of Parliament, made and passed in a session of Parliament in the first and second years of the reign of Queen Victoria, entitled "An Act to Abolish Composition of Tithes and to Substitute Rentcharges in lieu thereof," the said defendant had in said last mentioned parcels of said titheable lands of, &c., situated within the said parish, *an estate of inheritance within the meaning of the said last mentioned Act of Parliament, under which and derived wherefrom there was not on the said 1st day of November, in the year of our Lord 1849, or during the said space of six years ending on said day, and before then elapsed, any such estate of inheritance or other estate, or interest as in and by the said last mentioned Act of Parliament is defined to be a perpetual estate or interest for the purpose of said Act*, by reason of which premises, and by virtue of said last mentioned Act of Parliament, the said parcels of land became liable to and were charged with the payment of a certain annual sum or rentcharge, to wit the annual sum of £45. 5s. 9d., being three-fourths of the aforesaid annual amount of the said tithe compositions, so as aforesaid assessed and applotted on said parcels of land, and payable to the rector of said parish for the time being, and said rentcharge became payable by said defendant in respect of his said estate or interest in said parcels of land, and was to be paid on the 1st day of November, in the year of our Lord 1838, by one entire payment, and each succeeding year by two equal half-yearly payments payable, on every 1st of May and 1st of November in each and every year; and the said plaintiff saith that the said Rev. John

Galwey, on the 1st. day of November 1828, and from thence until the time of his death on the 15th day of November 1849, was rector of the said parish; of all which the said defendant, to wit, on &c., at &c., had notice; and the said plaintiff avers that on the 1st day of November 1849, at &c., a large sum of money, to wit, the sum of £75. 19s. 4½d., being for divers, to wit, three half-yearly gales, and a proportionable part of one further gale from said 1st of November 1849, of said rentcharge, ending on the day and year last aforesaid, became due and payable by the said defendant in respect of such his estate or interest aforesaid in the parcels of land to the said Reverend John Galwey in his lifetime, who on the said 1st day of November 1849, for a long space of time, to wit for six years, ending on that day, and being then the rector and lawful ecclesiastical incumbent of said parish, and as such entitled by law to the receipt of said rentcharge, to wit, at &c. *Breach*, that defendant did not pay the same to John Galwey or plaintiff as administrator, whereby an action hath accrued, &c.

H. T. 1851.
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 GALWEY
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 O'MEAGHER.

The declaration also contained the money counts and a profert of the letters of administration.

Special demurrer, assigning as cause to the first count, that the venue should have been laid in the county of Tipperary, where the lands were situated, the defendant being sued as assignee of a term, and only in respect of privity of estate.

Second, that the plaintiff should have averred the continuance of the term at the time when the assignment was stated to have taken place, or at least when the rent or some part thereof was alleged to have accrued due.

And as cause of general demurer to first count, that an action of debt founded alone upon privity of estate did not lie against the defendant as assignee after the expiration of the term and estate for rent accrued due during the term.

As to the second count—First, that the venue should have been laid in the county of Tipperary.

Second—That the plaintiff had not shown that the defendant had such an estate of inheritance, or such an estate at all, as would render him liable to pay tithe rentcharge in the parcels of land

H. T. 1851. therein mentioned within the meaning of the 1 & 2 *Vic.* referred to.
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 O'MEAGHER. Third—That the expression used in the declaration, “estate of inheritance within the meaning of said Act,” was insensible, and that no material issue could be joined thereon.

Fourth—That the plaintiff had not negatived the fact of there not being a landlord who had undertaken the payment of composition for tithes within the meaning of the 3 & 4 *W.* 4, nor a tenant in dower, nor a tenant by the courtesy liable to pay same.

Fifth—That the plaintiff had not shown when the three half-yearly gales, part of the three-and-a-half yearly gales claimed by him, respectively accrued due, and for ought that appeared, same might have accrued long before the time when the estate in respect of which the defendant was sought to be charged was alleged to have come to him.

Sixth—That the plaintiff alleged that £75. 19s. 4½d. rentcharge was due on the 1st of November 1849, and immediately after averred that part of said sum became due on the 15th of November 1849, which averments were inconsistent and insensible.

The general issue was pleaded to the residue of the declaration. Joinder in demurrer.

Thomas Galwey, in support of the demurrer.

The venue should have been in the county of Tipperary, for the action is against the assignee of the lessee, and is founded on privity of estate, and is therefore local: *Thursby v. Plant* (a). To entitle the plaintiff to the benefit of the statute of 11 *Ann.* c. 2, s. 6, he should have averred the execution of a demise by indenture under seal. In *Grogan v. Magan* (b) the action was covenant on an indenture under seal. This count is also bad on general demurrer, as no action of debt lies against an assignee after the estate has determined.

As to the second count, the venue in respect of the cause of action there stated was also local. At Common Law, when an action accrues in respect of an estate in the lands, and the liability arises from the party being in possession, the venue is

(a) 1 Saund. 241, *d. c.*

(b) 11 Al. & N. 366.

local, and that has not been altered by statute.—[BLACKBURNE, C. J. H. T. 1851. *Queen's Bench*
 This is a liability imposed by an Act of Parliament on the defend- GALWEY
 ant if he occupy the lands.—MOORE, J. It is a substitution for v.
 the tithe composition, and where a general right to receive money O'MEAGHER.
 is given by an Act of Parliament, the general rule is, that the venue
 in such action may be transitory.]—We admit that in actions for tithe
 composition, before the Act of Parliament, the venue was transitory,
 there being an existing contract, but that has been altered by 1 & 2
Vic. c. 109, and the rentcharge thereby substituted for the tithe
 composition is no longer payable in right of occupation, but in right
 of estate.—[CRAMPTON, J. It is an action of debt for a Parliament-
 ary duty imposed in respect of privity of contract.]—The 1 & 2
Vic. c. 109, requires the civil-bill for such rentcharge to be brought
 in the county where the lands lie.—[MOORE, J. That would lead to
 the inference that prior to the Act the venue was transitory.]

This count is also bad in not showing that the defendant had
 such an estate as would render him liable to pay the rentcharge ;
 it ought to have negatived the exceptions in the statute 1 & 2
Vic. c. 109, s. 8. That was expressly decided by this Court
 in *Black v. Howley*, the Court there holding that the 8th section
 was incorporated into the 7th by the words "except as hereinafter
 excepted," and that the exceptions must be negatived: *Vavasour*
v. Ormrod (a). This count is also bad in merely stating that the
 defendant had an estate of inheritance in the lands, as no definite
 issue could be taken thereon.

Brereton, contra.

As to the venue, *Grogan v. Magan* expressly applies ; for there
 the privity of contract was transferred by statute, and rendered
 the venue transitory.—[MOORE, J. Here a general demise is
 alleged without stating any covenant.]—An implied covenant is
 raised by the words "yielding and paying."—[MOORE, J. No
 covenant can exist without a deed ; for all that appears here, this
 may have been a parol demise.]

Then, as to the other point, it is said we have not negatived the

(a) 6 B. & C. 430.

H. T. 1851. exceptions in the statute; it is sufficient to say, as here, any such
Queen's Bench estate of inheritance, or other estate or interest as by the Act of
 GALWEY Parliament is defined to be a perpetual estate.—[MONKE, J. Every
 v. thing stated in this count may be true; but yet the defendant may
 O'MEAGHER. not have the first estate of inheritance, which alone would render
 him liable under this Act. You ought to negative each particular
 exception to enable the opposite party to join issue.]—We aver that
 it is an estate of inheritance within the meaning of the Act of Parlia-
 ment; the defendant is not thereby prevented taking issue.—[BLACK-
 BURN, C. J. You are proceeding under a statutable provision,
 which makes a person liable to pay, excepting certain classes of
 cases; therefore, in order to show that liability, you must negative
 the excepted cases, and that must be done specifically, and not by
 general averment.]—It cannot be held that it was the intention of
 the Act to throw upon the plaintiff the onus of finding out the
 defendant's title.—[BLACKBURN, C. J. The defendant may be
 tenant by the courtesy, or he may be tenant for life antecedent to
 the inheritance, and in either case would ~~not~~ be liable; and you
 rely on an Act of Parliament containing these exceptions, which
 you have not negatived; the rules of pleading are against you.—
 CRAMPTON, J. A person might have an estate in fee, and the
 defendant a lease for lives renewable under him, and that state of
 things would be quite consistent with this declaration.]—Unless the
 words in the count, "within the meaning of the Act," meet the
 objection, the demurrer is good; but we submit that species of
 general averment is enough.—[PERRIN, J. The Act of Parliament
 says a person is liable by reason of his having a particular estate;
 before you can render him liable to its provisions, you must show
 he is in of that estate.]

Per Curiam.—We must allow the demurrer.

BLACK v. HOWLEY.

DEBT, for tithe rentcharge.—The declaration stated that a composition for the tithes payable within the townlands of Upper and Lower Ballymurry, in, &c., had been duly made pursuant to the Tithe Composition Acts, and the annual amount thereof fixed and ascertained by the certificate of a Commissioner appointed in that behalf, and certified to be payable to W. A. for the tithes claimable by him as lay impropriator of said tithes; and the said composition had been afterwards duly assessed and applotted on the titheable lands in the parish, and the applotment signed by the Commissioner; that upon two hundred and ninety-four acres, thirty-seven perches of the said denomination, within the said parish, the sum of £22. 2s. 7½d., parcel of the entire composition, was applotted, payable annually; that on the 7th of June 1849, and for two years ending on that day, and after the passing of 1 & 2 Vic. c. 109, the defendant had in such last mentioned parcel *an estate of inheritance, to wit to him and his heirs, under which, or derived wherefrom, there was not on the 7th day of June 1849, or during the said two years ending on that day, or at any time, any such estate or interest as in the said last mentioned Act of Parliament is defined to be a perpetual estate or interest for the purposes of said Act, to wit, &c., by reason of which premises, and by virtue of said last mentioned Act of Parliament the said parcel of lands became liable to and charged with the payment of a certain annual sum of £15. 2s., being three-fourths of his proportion of the aforesaid annual amount of said tithe composition, &c.; that the rent became payable by the defendant in respect of his said estate, &c., and was to be paid by two equal half-yearly payments; that W. A. being entitled as such lay impropriator, &c., on the 1st of August 1845, by a deed duly enrolled, sealed, &c. (Profert), granted and conveyed all his estate, &c., as lay impropriator, to the plaintiff, who thereby became and still was impropriator,*

H. T. 1851. priator, &c., and entitled to the receipt of the rentcharge, &c.; that
Queen's Bench
 BLACK on the 7th of June 1849, £24. 17s. 9d. became due by defendant in
 v. respect of his estate, &c., to plaintiff as lay impropiator, he being on
 HOWLEY. the 7th of June 1849, and for a year and a-half prior thereto, the
 lay impropiator of said lands, &c., and as such entitled to the said
 rentcharge, whereof the defendant had due notice.—*Breach*, non-
 payment of the said sum.

The declaration also contained the money counts.

Special demurrer, that the declaration should have negatived the exceptions in 1 & 2 *Vic. c. 109*, it not being inconsistent therewith that some other person may have been liable to the payment of said rentcharge, and defendant not liable; that it merely stated the defendant had an estate of inheritance in the lands, and should have shown that he was not exonerated from the payment of the rentcharge, and that it was consistent with the declaration that during the first of the half-year there was some estate or interest, as in the Act is defined to be a perpetual estate or interest under or derived from the defendant's said estate.

Cuffs, in support of the demurrer, relied on *Vavasour v. Ormrod* (a); 1 *Chitty on Pleading*, p. 246 (7th ed.); and in answer to an objection that the demurrer was too large, cited *Briscoe v. Hill* (b); *Slade v. Hanley* (c); *Vivian v. Jenkin* (d); *Monkman v. Shepherdson* (e); 1 *Wms. Saund.* p. 285, b, note 9.

Hickey and Joy, contra, referred to *Jones v. Axon* (f); *Spieres v. Parker* (g); *Gill v. Scrivens* (h).

Cur. ad. vult.

BLACKBURNE, C. J.

Jan. 18. The Court are of opinion that the first count of this declaration is bad in not having negatived the exceptions contained in the

(a) 1 B. & C. 450.

(c) 13 M. & W. 757.

(e) 11 Ad. & El. 412.

(g) 1 T. R. 141.

(b) 10 M. & W. 735.

(d) 3 Ad. & El. 741.

(f) 1 Ld. Ray. 120.

(h) 7 T. R. 27.

8th section of 1 & 2 Vic. c. 109. The demurrer, which is pointed at the whole declaration, is obviously too large; but the decision of the Court of Exchequer in England, and the authorities referred to in *Monkman v. Shepherdson*, show that notwithstanding we may give judgment for the plaintiff on the counts that are good, and for the defendant on those that are bad. We adopted this course in *Spearing v. Hamilton*, decided on the 17th of April 1849.*

H. T. 1851.
Queen's Bench
BLACK
v.
HOWLEY.

* SPEARING v. HAMILTON.

1849.
April 17.

THIS was an action of covenant by the assignee of the lessor against the assignee of the lessee. The declaration contained two counts, to which defendant demurred. The demurrer commenced in the usual form of general demurrer to the declaration, and assigned special causes to each count.

Where a demurrer is taken to a declaration, containing two counts, one of which is good and the other bad, the demurrer will be overruled as being too large.

Napier, for plaintiff, admitted the first count could not be supported; but that no objection could be sustained to the second count; the demurrer was too large it being to the whole declaration. He relied on *The Parrett Navigation Company v. Stower* (6 M. & W. 564). It was there held that a demurrer commencing, "And the defendant says that the said declaration is insufficient in law," and then proceeded to assign separate causes of demurrer to each count, was in form a demurrer to the whole declaration; and that if any count was good the plaintiff was entitled to judgment, the demurrer being too large: *O'Shea v. Dooley* (9 Ir. Law Rep. 564).

Hamilton and Joy, contra.

It has been held by Baron Parke, in accordance with the note to *Hinde v. Gray* (1 M. & G. 201), that the practice of overruling demurrers as being too large is erroneous. The demurrer is not a pleading, and not demurrable to for its form. The proper course is to give judgment on the pleadings for the plaintiff on that count which is good, for the defendant on that which is bad: *Briscoe v. Hill* (10 M. & W. 735).

BLACKBURN, C. J.

The second count is clearly good, and the demurrer, being to the whole declaration, must be overruled.

Per Curiam.

Let the demurrer in this cause be overruled, and let the plaintiff have judgment on the second count, and the defendant judgment on the first count.

E. T. 1851.
Queen's Bench

CROMMELIN v. MARQUIS OF DONEGAL.

May 11.

A plaintiff having obtained interlocutory judgment, and having taken no step in the cause for upwards of two years, the Court granted a rule to proceed on an affidavit, stating he was prevented proceeding by want of means, and in the hope that a compromise would be effected.

MEADE, on behalf of the plaintiff, moved that he might be at liberty to proceed in the action. This was an action of covenant, and a demurrer had been taken to part of the declaration, and a plea put in to the residue. The plaintiff specially demurred to the plea, and joined in demurrer on the causes assigned by the defendant. Ultimately the plea was abandoned, and the demurrer to the declaration was overruled, and judgment given for the plaintiff: *Crommelin v. Marquis of Donegal (a)*. That was in Michaelmas Term 1847. Before the new General Orders a Term's notice was all that was requisite to entitle a party to proceed; but by the 243rd General Order, "where, after declaration, and before final judgment shall have been marked, no proceeding shall have been taken in any action for one year and a day by either plaintiff or defendant, and no compromise shall be depending," the plaintiff is not to proceed until he have served on the defendant a rule for liberty to proceed in eight days after service, and such rule may be obtained in the office at any time within two years from the last proceeding; "but after the lapse of two years the party requiring such rule shall serve notice of motion, and apply to the Court for same." We state in our affidavit that we were delayed by want of means, and in the hope that defendant would have settled.

Molyneux, contra.

This is entirely a speculative action, and the defendant has made no affidavit alleging any damage he has sustained. The affidavit relied on is made by his attorney. If there be any good reason offered for his lying by, the Court would grant the rule to proceed, but none is suggested here.

BLACKBURN, C. J.

The plaintiff has got an interlocutory judgment, and the Court cannot refuse the rule for liberty to proceed. We will allow the rule to issue, but the plaintiff must pay the costs of this motion.

Rule accordingly.

H. T. 1851.

Exchequer.

JAMES O'HALLORAN, and GRACE his Wife,

v.

CHARLES STUDDERT, Gent., one of the Attorneys.

(Exchequer.)

Jan. 15.

DEBT, for the use and occupation of a certain messuage, farm and lands, with the appurtenances, of the plaintiffs, in right of the said plaintiff Grace O'Halloran, by the said defendant, at his special instance and request, &c. The amount of rent claimed by the plaintiffs was £67. 18s. 4d., being a year's rent to the 29th of September 1849.

Rent due by the husband individually cannot be set-off against rent due to the husband in right of his wife.

The defendant pleaded the general issue, and, together with the notice of plea, served the following notice of set-off on the plaintiffs:—"Take notice that the above-named defendant, on the trial of this cause, will give in evidence and insist that the above-named plaintiffs, before and at the time of the commencement of this suit, were and still are indebted to the said defendant in the sum of £72. 10s. for the use and occupation of a certain messuage, lands and premises, with the appurtenances, of the said defendant, for a long time heretofore, to wit for the space of one half year, ending the 25th day of March, A. D. 1849, held and enjoyed by the plaintiffs at their request and by the sufferance and permission of the defendant for the said period; and in the sum of £72. 10s., found to be due by the plaintiffs to the said defendant on an account stated between them; and that said defendant will set-off and allow to the said plaintiffs on the said trial so much of the said sum of £72. 10s., so due and owing from the said plaintiffs to the said defendant, against any demands of the said plaintiffs to be proved on the said trial, as will be sufficient to satisfy and discharge such demand according to the statute in such case made and provided." A further notice of set-off was served by the defendant as follows:—"Take notice, that in addition to the sum of

H. T. 1851. "£72. 10s., mentioned in defendant's notice of set-off in this cause,
Eschequer.
 O'HALLORAN "defendant will, on the trial of this cause, seek to set-off against
 v. "plaintiffs' demand a further sum of £31. 9s. 2d., being the arrear
 STUDDERT. "of rent due by the plaintiffs to defendant out of the lands of
 "Toonagh up to and for the 29th of September 1848."

At the trial at the Limerick Spring Assizes of 1840, before Jackson, J., the following facts appeared in evidence :—That under the will of one Thomas Steel, the plaintiff Grace O'Halloran (then the widow of one John O'Halloran) became entitled to and possessed of certain lands called "The Cottage Division of Cullane," for the term of her life, and that being so entitled and possessed, she, by accepted proposal of the 12th of March 1824, set the said premises to the defendant for the entire of the term, tenancy to commence from the 25th of March 1824, at a yearly acreable rent of one guinea and a-half, payable on each 25th of March and 29th of September. It appeared that the plaintiffs resided along with their son James O'Halloran at a place called Toonagh, and which was held under the defendant (as alleged by the defendant) by the plaintiff James O'Halloran at the rent of £145 a-year since March 1845; that the receipt of the plaintiffs for the rent of Cullane was given to the defendant by some arrangement between the parties on each settlement of the rent of Toonagh, up to and for the 29th of September 1848. That circumstance, with others, was relied on to show that James O'Halloran the plaintiff was the tenant to Toonagh, and not James O'Halloran junior, as alleged by the plaintiffs. The lands of Toonagh were taken up by the defendant on the 25th of March 1849.

The Judge directed the jury that if they believed James O'Halloran senior was really the tenant to Toonagh, and that the rent due to defendant out of Toonagh exceeded that due to the plaintiffs out of Cullane, they should find for the defendant.

The jury found a verdict for the defendant.

The Counsel for the plaintiffs objected to the Judge's charge, on the ground that, "even assuming the husband had been tenant to the lands of Toonagh, a debt due by the husband alone could not be set off against an action by husband and wife jointly." Liberty reserved by the Judge to enter a verdict for the plaintiffs for

£67. 15s. 4d., if the Court above should be with the plaintiffs on the point saved.

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Exchequer.
 O'HALLORAN
 v.
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Sir C. O'Loghlen now moved the Court that a verdict be entered for the plaintiffs for the sum of £67. 15s. 4d., pursuant to the liberty reserved by the Judge below.

He contended that, as the rent of Cullane was due to the plaintiffs in right of the plaintiff Grace O'Halloran, and as the rent of Toenagh was due by the plaintiff James O'Halloran individually, they were debts of a different nature, and could not be made the subject of set-off. The rent now due of Cullane might become the property of the wife by survivorship, the debts of the husband should not therefore be set-off against that rent: *Williams on Executors*, 4th ed., p. 725. "Likewise if a woman leases her land (for life or years), reserving rent, and afterwards takes husband, the wife shall have the arrearage of rent incurred during the coverture, and not the executors of the husband:" 1 *Roll. Abr.* p. 450, tit. *Baron & Feme*, D, pl. 2, pl. 5.

J. D. Fitzgerald and *Brereton*, for the defendant.

The defendant could sue alone for the recovery of the rent of Cullane although he is entitled to that rent in right of his wife; if that proposition be correct, then his individual debt can be set-off against that which he could recover, suing alone.

Sir C. O'Loghlen, in reply, denied the proposition of *Mr. Fitzgerald*, and referred to *Buller's N. P.* p. 179; *Montague on Set-off*, p. 29.

Prior, C. B., delivered judgment.

Upon the application to enter a verdict for the plaintiffs for the amount of the rent which accrued after the 25th of March 1849, the question is, whether the set-off claimed by the defendant was properly allowed at the trial?

The plaintiffs, husband and wife, sued for rent which accrued after coverture upon a letting made before coverture, of lands the property of the wife. The set-off was of a demand for rent, claimed

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against the husband as due by him individually, and upon a liability with which the wife was not connected.

It was contended for the defendant that the demand for which the plaintiffs sued in this action was one for which the husband could have sued alone, and that as he could have so sued, and as payment to him would have discharged the defendant, it followed that the husband's debt might be set off against such a demand.

No doubt can exist that, in suing for rent which has accrued due after the coverture upon a demise of the wife's lands made while she was sole, the husband has his election either to sue alone or to join his wife as a co-plaintiff: *Com. Dig., Baron & Feme, X.* The same rule of law applies to several cases in which the wife is (in the language of the books) "the meritorious cause of action;" as, in that of a bond or promissory note made to a married woman, the husband may take the exclusive benefit of the contract and sue in his own name, or he may assent to the wife's interest in the contract and make her a co-plaintiff in the action. The rule of law is stated, and some of the authorities are referred to—*Phillishirk and wife v. Pluckwell* (a). In a case which I think may be considered as belonging to this last-mentioned class—*Burrough v. Moss* (b)—a question respecting a claim to set-off arose, similar to that upon which we have now to decide, and was dealt with by the Court upon a view of the law by which I think we ought to be governed. That was an action of assumpsit on a promissory note, made by the defendant, payable to the wife of John Hearne, to secure a debt due by another person to the wife before her marriage. The plaintiff sued as indorsee by indorsement from the husband alone, by which indorsement it was not of course disputed that the note was legally transferred to the plaintiff. The defendant in the action sought at the trial to set-off against this demand a debt due to him by the wife before coverture. The Court held that such a set off could not be allowed. Mr. Justice Bayley, in giving judgment, said:—"On behalf of the defendant it has been insisted that the defendant is entitled to set off two sums, one of which (£51) was due to him from Mrs. Fearne before her marriage. As to that, I am of opinion that he has not a right of set-off. The action was brought on a

(a) 2 Maul. & Sel. 393.

(b) 10 Bar. & Cres. 358.

"note given to Mrs. Fearne during her coverture, not by a person
 "who was her debtor before her marriage, but by a party who came
 "in aid of the debtor. The form of the security gave the husband
 "a right to treat it as joint property, or as several; and if he chose
 "to treat it as several, he might deal with it as his own; and the
 "consequence of his so treating it would be to let in, by way of
 "set-off to any claim by him, any debts due from him. If, on the
 "other hand, he elected to treat as a joint property of himself
 "and his wife, in her right he might let in debts due from her in
 "her own right; but it is clear that both classes of debts would not
 "be let in. It appears that in the present case he elected to treat
 "the note as his separate property; for he indorsed it over to the
 "plaintiff. That mode of dealing with it leads to the same con-
 "sequences as if the note had been given to him alone, and
 "consequently the debt due from his wife before her marriage cannot
 "be set off."

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The principle of the decision in *Burrough v. Moss* appears to me to apply directly to the present case. It is plain that in this action, in which the husband and wife are co-plaintiffs, suing for rent due in respect of the wife's estate, the defendant might have set off a debt due by the wife before coverture, and for which the husband and wife could be properly sued as co-defendants. And to set off also the separate debt of the husband in the same action would be to deal with these two classes of debts in the very manner in which the Court in *Burrough v. Moss* determined that they could not be dealt with. The only difference between that case and the present is, that there the husband dealt with the debt as his own. Here he has dealt with it as the debt of himself and his wife, in which she would have an interest that must survive to her if he should die pending the action.

The rule of law which we are now applying is, I think, consistent not only with the principle which governs, in reference to demands of this nature, the marital rights and liabilities, but with good sense and justice. The law invests the husband with the power of making his wife's debts and contracts his own by suing for them in his own name only; but leaves him also at liberty to reject that

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exclusive privilege, and to make her a sharer to a certain extent in the benefit of those debts and contracts by suing for them in the joint names of himself and her. In the former case the framer of the action will let in the set off of his own debts and exclude a set-off of hers; the recovery will enure for his own benefit alone, and if he dies before payment or satisfaction, the judgment will pass to her executors. In the latter case the set-off of *her* debts will be allowed, and that of his debts will be excluded, and the recovery will so far enure to her benefit, that if he dies before payment or satisfaction, the judgment will rest exclusively in her by survivorship. Circumstances sometimes exist in which it would be not only prudent but equitable, towards the wife, that the husband should so deal with debts, of which his wife was "the meritorious cause," as not to extinguish her chance of survivorship, and as not to make the accruing profits of her lands when sued for, or securities passed to her individually for her own earnings during coverture, subject to the set-off of his debts. That an embarrassed man, who derives the whole means of subsistence from the talents and industry of his wife's earning, for the support of both and their family, a competent income as an artist, a musician, a teacher, or a writer, should suffer her to accept securities for the amount of her earning in her own name, and should, when it might become necessary to sue upon them, so proceed as to give to her a joint interest in the proceeding, seems not inconsistent with reason or justice.

We are of opinion that the verdict in this case ought to be entered for the plaintiff for the amount of the rent due by the defendant and ascertained at the trial, reduced by the sum which has been paid since the trial to the plaintiff O'Halloran. It was competent to the husband to receive the debt, or a part of it, although his own debt could not have been set off in this form of action.

PENNEFATHER, B., and LEFROY, B., concurred.

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SAMUEL ANDERSON, in Error,

v.

ANNE FITZGERALD,

Administratrix of PATRICK FITZGERALD.*

Jan. 22.

April 24.

ASSUMPSIT against the defendant as one of the Directors of the United Kingdom Life Assurance Company, to recover the sum of £450, the amount of a policy of insurance, bearing date the 8th of August 1846, effected on the life of Patrick Fitzgerald. The policy was as follows:—

“Whereas Patrick Fitzgerald, of Kilrush, in the county of Clare, Ireland, nurseryman, is desirous of making an assurance with the United Kingdom Life Assurance Company in the sum of £450 upon his own life, and hath warranted, and doth warrant, that his

A policy of insurance effected on the life of A contained a recital, that A was a nurseryman, and had warranted, and did there- by warrant, several mat- ters, therein particularly specified, res- pecting his age, profes- sion, state of

health, and mode of life; and also contained a proviso, that if A should die upon the high seas, or *felo de se*, &c., or if any thing so warranted as aforesaid should not be true, or if any circumstance material to the insurance should not have been truly stated, or should have been misrepresented or concealed, or should not have been fully and fairly disclosed and communicated to the Company, or if any fraud should have been practised upon the Company, or any false statement made to them in or about the obtaining or effecting of the insurance, the policy should be void, and all monies paid on account thereof forfeited.

A declaration in assumpsit on this policy, after setting forth the policy, its consideration, and the promise by the Company, averred that the statements of the matters warranted [setting them forth *seriatim*] were true, and that there was not any circumstance material to the insurance mis-stated or misrepresented, or concealed, or not justly and fairly disclosed, and that there was not any fraud practised on the Com- pany, or any false statement made to them in or about the effecting of the policy, and concluded in the usual form. At the trial a proposal, executed by A prior to the exe- cution of the policy, was proved, which contained several queries put to A, and his answers thereto; and at foot thereof was an agreement that the particulars therein mentioned, and which might be stated by A, should form the basis of the contract between A and the Company; and if there was any fraudulent concealment or untrue allegation contained therein, or any circumstance material to the insurance should not have been fully communicated to the Company, or there should be any fraud or mis-statement, all money which should have been paid on account of the insurance should be forfeited and the policy void.

Held, that the proposal was no part of the contract.

Held also, that according to the true construction of the contract between the parties, a statement made in or about the obtaining of the policy must be not only false, but also material to the insurance in order to vitiate the policy, and that the question of materiality was properly left to the decision of the jury.—*Dissentientibus* MONAHAN, C. J., FIGOT, C. B., and JACKSON, J.

* *Absentibus* CRAMPTON, J. and RICHARDS, B.

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"name, residence and profession, business or occupation, is as above
 "stated, and that his age will not exceed fifty-two years on his next
 "birth-day; that he is not employed in military or naval or preven-
 "tive service; that he has had the small-pox, that he has not had
 "the cow-pox, and that he has not had the gout; that he has not
 "been nor is subject to or afflicted with rupture, fits, or convulsions
 "since childhood, asthma, insanity, or spitting of blood, and that he
 "is not afflicted with an habitual cough, or any disease or disorder
 "tending to the shortening of life, and that he has led, and con-
 "tinues to lead, a temperate life, and that he has a sound and good
 "constitution, and is now in a good state of health.

"And whereas the said Patrick Fitzgerald has paid the said
 "Company the sum of £21. 0s. 9d. as the premium for one year,
 "commencing on the 8th day of August 1846, and terminating on
 "the 7th day of August 1847, both days inclusive.

"KNOW all men by these presents, that if the said Patrick Fitz-
 "gerald shall die at any time within the term of twelve calendar
 "months, commencing on the 8th day of August 1846, and ending
 "on the 7th day of August 1847, both days included; or if the said
 "Patrick Fitzgerald shall, in the event of his living beyond the said
 "term of one year, pay to the said Company during his life the sum
 "of £21. 0s. 9d. on or before the 8th day of August in every subse-
 "quent year, the funds and property of the said Company shall be
 "subject and liable to pay and satisfy, within three calendar months
 "after proof satisfactory to the Board of Directors shall have been
 "received at the principal office of the said Company, of the death
 "of the said Patrick Fitzgerald, and the cause of such death, and
 "the circumstances connected therewith, and also of the time of the
 "birth of the said Patrick Fitzgerald, unless admitted by indorse-
 "ment hereon, by the production of certificates of birth, death and
 "burial, and of such other documents or vouchers, and by the afford-
 "ing such information as the Directors may reasonably require, unto
 "his executors, administrators or assigns, the sum of £450 hereby
 "assured.

"Provided always that in case the said Patrick Fitzgerald shall
 "die upon the high seas, unless in passing in decked vessels in time
 "of peace from one part of Europe to another, or shall go beyond

"the limits of Europe, or shall enter into or engage in any active
"military or naval service, or the preventive service, without previous
"license from the Board of Directors of the said Company for that
"purpose, or shall kill or destroy himself, or cause his own death,
"whether *felo de se* or otherwise, or die by duelling or by the hand
"of justice, or if any thing so warranted as aforesaid shall not be
"true, or if any circumstance material to this insurance shall not
"have been truly stated, or shall have been misrepresented or con-
"cealed, or shall not have been fully and fairly disclosed and
"communicated to the said Company, or if any fraud shall have
"been practised upon said Company, or any false statements made
"to them in or about the obtaining or effecting of this insurance,
"this policy shall be null and void, and all monies paid by or on
"behalf of the said Patrick Fitzgerald on account of this insurance
"shall become forfeited.

"Provided, nevertheless, that if this policy shall be kept in force
"for the space of five years, and five annual payments shall have
"been paid thereon, and that thereafter the said Patrick Fitzgerald
"shall die by duelling, this policy shall be valid for one-half of the
"sum hereby assured. And further, that although the said assured
"may die by duelling, or destroy himself, or cause his own death,
"or die by the hands of justice as aforesaid, yet that if any other
"person shall have acquired a *bona fide* interest in this assurance
"by assignment or by legal or equitable lien, this policy shall
"remain valid and in force to the extent of such other person for
"his benefit, and his receipt shall be a sufficient discharge to said
"Company.

"Provided always, and it is hereby expressly agreed and declared,
"and the true intent and meaning hereof is, that the capital, stock
"and funds of the said Company shall alone be answerable to the
"demands payable thereupon under this policy and all other poli-
"cies, and that no Director, officer, or member thereof shall in any
"event or on any account, or in any manner be subject or liable to
"any demand or claim against the said Company beyond his or her
"particular share or interest in the capital, stock or funds of the
"said Company at the time when such claim may arise, any thing

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"hereof notwithstanding. In witness whereof," &c.

The declaration contained three counts. The first count, after setting forth the policy, proceeded to aver, that in consideration that Patrick Fitzgerald, at the request of the Company, had paid to the Company £21. 0s. 9d. as a premium for the insurance of £450 upon the life of Patrick Fitzgerald for one year, and had then promised the Company to perform and fulfil all things in the policy on his part to be performed and fulfilled; the Company then and there promised Patrick Fitzgerald to become an assurer to him of the said sum of £450, and that they would pay to his executors, &c., within the time in the policy, said sum, and would perform and fulfil all things in the policy contained on their part to be performed or fulfilled.

It then averred that the statements of the matters warranted, going through them *seriatim*, were as in policy stated, and that the matters so warranted were true, and that there was not any circumstance material to the insurance mis-stated or misrepresented or concealed, or not justly and fairly disclosed, and that there was not any fraud practised upon the Company, or any false statement to them in or about the effecting of the policy.

It then averred the death of Patrick Fitzgerald on the 8th of December 1846; that he did not die upon the high seas, or by suicide, &c.; that satisfactory proof of his death was received by the Company; that administration was granted to the plaintiff on the 20th of April 1847; that although Patrick Fitzgerald in his lifetime had done all things in the policy contained on his part to be performed, and although the capital stock of the Company was sufficient to pay the amount of the policy, and although three calendar months have elapsed since the death of Patrick Fitzgerald was certified to the Company. *Breach*, non-payment of said £450.

The second and third counts were to the same effect, and the fourth was the money count.

To this declaration the defendant pleaded—first, the general issue, and four special pleas to the first, second and third counts.

Second plea.—*Actionem non*; because he saith that before the executing of the said policy, to wit on the 17th of June 1846,

Patrick Fitzgerald made a statement to the Company in or about the effecting of the policy, to wit, a declaration in writing, setting forth several of the statements made therein by Patrick Fitzgerald in reference to his age, state of health, medical attendants, health of his near relations, and as to whether he had been accepted or refused at other offices, and setting forth the agreement at foot thereof. It then averred that the particulars therein did form the basis of the contract, and that the statement and declaration was false, and contained an untrue and unfaithful representation of the facts, in this, that at the time of the making of the declaration his age was more than fifty-two; that he had a disease of the lungs and other diseases tending to shorten life; that he had consulted divers physicians and surgeons; that several of his near relatives had died of consumption; that he had been accepted at divers Insurance Offices.—Verification.

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The third plea set forth a statement made by Patrick Fitzgerald to the Company through their medical officer (which was much to the same effect as the declaration), and averred, as in the second plea, that this statement was false.

The fourth plea averred that Patrick Fitzgerald was afflicted with a disease tending to shorten life.

Fifth, that he was afflicted with a disease of the lungs.

Replication, *similiter* to the first plea, and *de injuria* to the others.

At the trial of the case at the Spring Assizes of 1848 for the county of Limerick, before BALL, J., plaintiff gave the usual proofs, and among other matters the following proposal was proved :—

UNITED KINGDOM LIFE ASSURANCE COMPANY—PROPOSAL FOR
 INSURANCE.

*Particulars to be filled up, signed and witnessed, and sent to the Office Nos. 8 and 9
 Waterloo-place, Pall Mall, London.*

W. H. HALL, Limerick.

Kilrush, 17th day of June 1846.

1st.—Name, residence and profession, business or occupation of the person on whose behalf the assurance is proposed?—Patrick Fitzgerald of Kilrush, county Clare, Nurseryman.

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2nd.—Name, residence and profession, business or occupation of the person whose life is proposed to be assured?—As above.

3rd.—Place and date of birth?—Cappagh, near Kilrush, Easter day 1795.

4th.—Age next birth-day?—52 years next birth-day.

5th.—Is the person whose life is to be assured married or single?—Married.

6th.—Has the party resided abroad; and if so, where, when and how long, and did his health suffer from such residence?—Never.

7th.—Is the party employed in military, naval or preventive service?—No.

8th.—What has been the profession, business or occupation of the party during the last——years?—As above stated.

9th.—Has the party had the small-pox or the cow-pox?—Small-pox.

10th.—Has the party had the gout?—No.

11th.—Has the party whose life is to be assured been, or is he subject to or afflicted with rupture, fits or convulsions since childhood, asthma, insanity, or spitting of blood, and if so, which?—No.

12th.—Is the party afflicted with an habitual cough or any disease of the lungs, or any disease or disorder tending to the shortening of life?—No.

13th.—Has the party led, and does he continue to lead, a temperate life?—He has led a temperate life, and continues so.

14th.—Has the party a sound and good constitution, and is he now in a good state of health?—He is.

15th.—Name and residence of the person's usual medical attendant to be referred to for information as to the present state of health and habits of the party, and how long has he known him?—Had no occasion for medical advice since 1822, when the late Doctor Elliott attended me for fever.

16th.—Has the party consulted or been attended by any other physician, surgeon or apothecary during the last three years, and what is or are his or their names or name, and what was the cause of such consulting or attendance?—No.

17th.—Name of an intimate friend to be referred to who can give

correct and full information as to the present and general state of health and habits of the party, and how long has he known him?—
 Mr. James M'Mahon of Kilrush, and Mr. Thomas Chambers of Kilrush, has known him — years.

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18th.—Is there any other circumstance or information touching the past or present state of health or habits of the life of the party whose life is proposed to be assured, with which the Directors ought to be made acquainted?—I do not know of any.

19th.—Are the party's parents alive, and what are their respective ages?—Father died aged 85; mother died aged 87.

20th.—Are the parents dead, and at what age did they die?—As above stated.

21st.—Did any of the party's near relations die of consumption or any other pulmonary complaint?—No.

22nd.—Has the party's life been accepted or refused at any office; and if accepted, was it at the usual premium, or with what addition?—No.

23rd.—Sum now proposed to be insured?—£450.

24th.—Whether with participation of profits or not?—Without participation of profits.

25th.—Term for which the insurance is required?—Whole life.

26th.—Does the party insuring wish to pay the premium by instalments?—Yearly.

27th.—Will the party attend personally?—He will.

I hereby agree that the particulars mentioned in the above proposal, and which may be stated by the referee above or hereunder mentioned, as the case may be, shall form the basis of the contract between the assured and the Company; and if there be any fraudulent concealment or untrue allegation contained therein, or any circumstance material to this insurance shall not have been fully communicated to the said Company, or there shall be any fraud or mis-statement, all money which shall have been paid on account of this insurance shall become forfeited; and the policy be void.

(Signed) PATRICK FITZGERALD.

Witness, name and address,

WM. HENRY HALL.

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The statement made to the medical officer of the Company was also proved, which was a mere echo of the proposal.

Several witnesses were also examined on the part of the defendant, from whose evidence it appeared that several of the statements made in the declaration were false; amongst others, his statement that he had not been insured at any other office, and also as to the health of the members of his family, it having been proved that two of his sisters died of consumption.

The Counsel for the defendant having closed their case, called on the Judge to direct the jury that, if they believed that previously to the making of the policy any false statement was made to the Company by Patrick Fitzgerald in or about the obtaining or effecting of the insurance, although the jury should believe the same was not material to the insurance, they should find a verdict for the defendant on the issue first joined as to the first plea, but the Judge refused so to direct the jury, and this formed the ground of the first exception. Defendant's Counsel also called upon the Judge to direct the jury, that if they believed that before Patrick Fitzgerald signed and made to the Company for the obtaining of said insurance the proposal dated the 17th day of June 1846, Patrick Fitzgerald's life had been refused to be insured at the offices of other Insurance Companies on proposals made by him for such purpose, and that the answer given by him in said proposal in reply to the question "whether his life had been accepted or refused at any other office," namely, "no," was a false statement made by him to the Company in or about the obtaining of the insurance, then that the jury should find a verdict for the defendant upon the said issue, although the jury should believe that such false statement was *not material to the insurance*; but the Judge refused so to direct the jury, and told the jury to consider *whether they believed the statement that the life of Patrick Fitzgerald had not been previously to the proposal refused to be insured at the offices of other Companies to be false, and if false, whether they believed such false statement to be material to the insurance, and if they believed the same to be both false and material, they should find*

a verdict for the defendant on said issue. This formed the ground of the second exception. E. T. 1851.
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The third exception was to the same effect as to insurances effected by Patrick Fitzgerald at other offices.

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The fourth exception was directed to the false statements made respecting the death of Fitzgerald's sisters, and the materiality or immateriality of this statement.

There were several other exceptions to the same effect, some applicable to the special pleas.

The jury found for the plaintiff.

The case was argued in the Court of Exchequer, and that Court gave judgment in Michaelmas Term 1849, overruling the exceptions.*

A writ of error was brought on that judgment.

* The following is the judgment on the argument of the exceptions, delivered in the Court of Exchequer:—

The Court differed in their opinion in this case.

LEFROY, B., was of opinion that all the exceptions were based on one general question, whether the answers given to the questions contained in the proposal were matters of representation or matters of warranty? That in matters of warranty the truth must be shown, whether the statement be material or immaterial; but in matters of mere representation, though the statement be false, the policy will not be avoided, unless the statement be material as well as false.

He considered in the present case the contract was to be collected from the policy alone, inasmuch as the policy (in his opinion) contained no reference to the proposal, and that therefore the latter was not incorporated in the policy, and could not be looked upon as affecting the contract as contained in the policy. He then read the proviso in the latter part of the policy, and held that, according to the true construction to be put upon the whole of that instrument (the policy) the word "material" should be incorporated after the words "false statement," contained in the proviso; these words would then stand, "any false statement material," &c. He further stated that although he arrived at the conclusion that the proviso in the policy must be read by incorporating into it the word "material" in the part referred to, yet the question was not free from difficulty; but that inasmuch as the words used were words of the Company and not of the assured, if they were doubtful or ambiguous, they should be construed most strongly against the party whose words they were—that is, the assurers, and most favourably for the assured. He then referred to that part of the policy in which some of the answers contained in the proposal were incorporated, and said that from this circumstance it was to be inferred that those matters alone, thus incorporated into the policy, and therefore expressly made matter of warranty, were the only matters warranted, and that the selection of some of the answers, and the making

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and *Synan and J. D. Fitzgerald*, for the defendant.

[The arguments and authorities cited will be found fully discussed in the following judgments.]

The following cases were cited:—

For the plaintiff—*Bowerbank v. Monteiro* (a); *Carr v. Stephens* (b); *Hartley v. Wilkinson* (c); *Carter v. Boehm* (d); *Scanlan v. Sceales* (e); *Quin v. The National Assurance Company* (f); *Richards v. Murdock* (g); *Sayre v. Rochford* (h); *Rich v. Basterfield* (i); *Cohen v. Huskisson* (k); *Geach v. Ingall* (l).

(a) 4 Taunt. 848.

(b) 9 B. & C. 758.

(c) 4 Camp. 127.

(d) 3 Burr. 1905.

(e) 6 Ir. Law Rep. 367.

(f) J. & Car. 316.

(g) 10 B. & C. 527; S. C. 1 S. L. Cas. 283.

(h) 2 Wm. Bl. 1169.

(i) 16 Law Jour. N. S. 273.

(k) 14 M. & W. 95.

(l) 17 Law Jour. N. S. 255, Ex.

them matters of warranty, excluded the others, and left the latter merely matters of representation. And he concluded by stating that in his opinion the answers given were matter of representation and not of warranty, and that therefore the charge of the Judge was right.

RICHARDS, B., said the case was one of considerable difficulty. That the case of *Scanlan v. Sceales*, which decided that when the proposal was referred to in the policy the matters stated in it (the proposal) became matter of warranty; and no matter how unimportant such matters might be, yet, if false, the policy became void, in his opinion, went far enough; and he said that were it not that that case was decided by the Court of Error, he would be disposed to say that it went too far. In the present case the Court (he said) was called upon to go a step further. The declaration in the present case was not referred to in distinct terms in the policy; it was possible that the parties might have intended to refer to the proposal in the policy; the reference, however, was exceedingly slight. He then referred to the case of *Bennett v. Anderson*, relied upon on the part of the defendants (the Company), and said that that case fully supported the view taken by the defendant's Counsel, and that he was far from saying that that decision was not right, and that probably it would be right to hold that if there were any untrue statements made in or about the effecting the policy, the policy should become void; but that hitherto being under the impression that the law was not, as represented in *Bennett v. Anderson* (*infra*, p. 265), he did not feel himself at liberty to make so great a deviation from the rule of law, as he heretofore understood it to be, as to make every thing stated in the proposal matter of warranty where the proposal was not referred to in the policy. He expressed a strong opinion upon the verdict

For the defendant in error—*Berthon v. Loughman* (a); *Pawson v. Watson* (b); *Pawson v. Barnavelt* (c); *Freeman v. Baker* (d); *Richardson v. Brown* (e); *Shep. Touch.* p. 87; *Flinn v. Headlam* (f); *Arnold on Insurance*, p. 490.

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Cur. ad. vult.

The Court, differing in opinion, delivered judgment *seriatim*.

April 24.

MOORE, J., having stated the pleadings and the facts, proceeded to say:—

The point raised by the exceptions appears to me to be, whether the materiality of the fact represented should have been left to the jury?

The jury found a verdict for the plaintiff, which appears to me to have been against the evidence, and I regret, that instead of a bill

(a) 2 Sem. 258.

(b) Cowp. 786.

(c) 1 Doug. 13, n.

(d) 5 B. & Ad. 797.

(e) 1 Bing. 344.

(f) 9 B. & C. 690.

of the jury, and stated that he was astonished that any respectable jury should have found such a verdict. He further said that he did not think that he could look to the proposal for the contract of the parties; that in his opinion the contract was to be found in the policy alone (that document not incorporating in it the proposal), and that inasmuch as in his opinion the policy did not make every statement made in or about the effecting of the policy matter of warranty, as contended for by the defendant's Counsel, he was of opinion that the charge of the Judge was right, and that judgment should be given for the plaintiff.

PIGOT, C. B., said that on the part of the defendant the case was rested on two grounds. First, that by reason of what was expressly declared at foot of the proposal every matter contained in that proposal became matter of warranty; and secondly, that the policy itself contained a stipulation to the same effect. He then read the declaration at foot of the proposal, and expressed an opinion that inasmuch as the document containing that declaration was not referred to by the policy, it could not be looked upon as controlling or affecting in any way the contract, which, in his opinion, was contained in the policy alone; and he expressed his disapprobation of the decision in the case of *Bennett v. Anderson*; but with respect to the other ground relied upon by the defendant's Counsel, and upon the terms of the policy itself, and particularly the clause by which it was provided that if any fraud should have been practised upon the Company, or any false statement made to them in or about the obtaining or effecting the insurance, the policy should be null and void, he considered it competent for the Company to say that if any false

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The question raised by the bill of exceptions appears to me one of great difficulty. My mind has fluctuated a good deal, and I entertain doubt as to the correctness of the opinion I have formed—a doubt which is considerably increased by the knowledge that a different opinion is entertained by other Members of the Court.

It is undoubtedly true that a false statement of a fact will often avoid a policy of insurance, and it will have that effect on one or other of two grounds—either of warranty or representation. The distinction between warranty and representation is well established. It is so clearly laid down by Lord Mansfield, in the case of *Pearson v. Watson* (a), that I shall read his Lordship's words:—"There is no distinction better known to those who are at all conversant in the

(a) Cowp. Rep. 787.

* Counsel for the defendant stated that it was by the advice of English Counsel the bill of exceptions had been taken.

statement were made in or about the obtaining the policy, that false statement should vitiate the contract. He had heard no argument against the right of the Company to stipulate (as they had done plainly and distinctly, and he would add, without any ambiguity), and there was in truth no ground for saying that such a contract should not be upheld; and certainly there was not any hardship imposed on the party effecting the insurance, nor could it be alleged that he was in any way entrapped by the stipulation that he was bound to tell the truth in effecting the policy. The Company had a right to say that, in order to guard against any possible deception, the parties should take the policy on this stipulation, that if any false statement were made in or about the effecting that policy, it should be void. He then referred to that part of Lord Kenyon's judgment, in *Worsley v. Wood* (6 T. R. 710), in which he says:—"These Insurance Companies enter into very extensive contracts of this kind, and are liable (as we have but too frequently seen in Courts of Justice) to great fraud and impositions; common prudence therefore suggests to them the propriety of taking all possible care to protect themselves from frauds when they make these contracts." The Company in the present case had done no more than provide a protection against fraud. They had in his opinion, in unambiguous language, declared that any false statement (that is, intentional false statement) made to them in or about the effecting of the insurance should avoid the policy; and having contracted upon such terms, he could recognise no power in the Court to incorporate into the clause the word "material." The CHIEF BARON concluded by expressing an opinion that the charge of the Judge was wrong; but as the majority of the Court (BARONS RICHARDS and LEFROY) entertained a different opinion, judgment should of course be entered up for the plaintiff.

BARON PENNEFATHER was not present.

"law of insurance than *that* which exists between a *warranty* or
 "condition which makes part of a written policy, and a *representa-*
 "*tion* of the state of the case. Where it is part of the written
 "policy it must be performed: as if there be a warranty of convoy,
 "there it must be a convoy. Nothing tantamount will do or
 "answer the purpose. It must be strictly performed as being part
 "of the agreement; for there it might be said the party would not
 "have insured without convoy. But, as by the law of merchants all
 "dealings must be fair and honest, fraud infects and vitiates every
 "mercantile contract. Therefore if there is fraud in a representation,
 "it will avoid the policy, as a fraud, but not as a part of the agree-
 "ment. If in a life policy a man warrants another to be in good
 "health, when he knows at the same time he is ill of fever, that
 "will not avoid the policy, because by the warranty he takes
 "the risk upon himself. But if there is no warranty, and he says
 "'the man is in good health,' when in fact he knows him to be ill,
 "it is *false*. So it is, if he does not know whether he is well or ill;
 "for it is equally false to undertake to say that which he knows
 "nothing at all of, as to say that is true which he knows is not true.
 "But if he only says 'he believes the man to be in good health,'
 "knowing nothing about it, nor having any reason to believe the
 "contrary, there, though the person is not in good health, it will not
 "avoid the policy, because the underwriter there takes the risk upon
 "himself. So that there cannot be a clearer distinction than that
 "which exists between a warranty, which makes part of the written
 "policy, and a collateral representation, which, if false in a point of
 "materiality, makes the policy void; but if not material, it can hardly
 "ever be fraudulent." I collect from this, that in order to make a
 "matter warranty, and give it the effect of a warranty, it must be
 "included in the policy; and further, that it is on the ground of fraud
 "a false statement will avoid a policy, and that only where it is
 "fraudulent in a material fact.

The first question that arises is, what is the contract between the parties? Has it been reduced to writing? and if so, what is that writing? In this case the false statement is contained in the written proposal of the 17th of June 1846, signed by Patrick Fitzgerald.

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E. T. 1851. *Is that proposal a part of the contract between the parties? If it be, the question is decided; for there then would be warranty, and the statement should be literally true. If it be not part of the contract, there can be no warranty, and then the statement in it could only operate on the policy by way of representation, and then its materiality would have to be inquired into.*

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I think that the proposal of the 17th of June 1846 is no part of the contract, and that the policy of insurance alone contains the contract. It is plain that when the proposal was signed there was no contract. It was merely an offer on the part of Fitzgerald, and a statement of the terms on which he was willing to take the insurance. The Company was at full liberty to accept or reject the offer, and to vary or modify the terms of it; and the form of the policy shows that the Company did not consider the proposal to be part of the contract, for it embodies a large number of the statements in the proposal, and makes them the subject of express warranty. In *Pawson v. Ewer* (a) it was held that, though the statement of instructions was wrapped up in the policy, it formed no part of it, but was only representation; and in *Bize v. Fletcher*, in the same reports, a statement of instructions wafered to the policy was held not to be part of it; and at the end of the case of *Pawson v. Watson* (b) it is observed:—"Mr. Davenport said he was desired "by the underwriters to ask whether it was the opinion of the "Court that, to make written instructions valid and binding as a "warranty, they must be inserted in the policy?" and Lord Mansfield answered that most undoubtedly such was the opinion of the Court. In my opinion it follows therefore from these authorities that the proposal was not by itself a portion of the contract; it might have been made so by distinct reference to it in the policy, and then it would come within the authority of *Scanlan v. Sceales*; but it appears to me that no person reading the policy could from it say that there ever had been such a document as the proposal; there is nothing on the face of the policy in reference to that document; in this respect, therefore, the case is clearly distinguishable from *Scanlan v. Sceales*; for in that case the proposal was referred

(a) Doug. Rep. 12 (note).

(b) Cowp. 790.

to in clear and unequivocal terms; there the opinion of the Court was, that there was such a clear reference to it as to incorporate it into the policy; some of the Judges thought it entirely incorporated, others only partially; but there was no controversy as to there not being a clear reference to it in the policy.

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The same observation applies to the case of *Bennett v. Anderson* (M.SS. Q. B., H. T. 1849);* in that case the Judge left the question of materiality to the jury, who found for the plaintiffs. On a motion for a new trial, the Court was unanimous in setting aside the verdict as being against evidence, and two of the Judges thought that there were sufficient words of reference to bring the case within the authority of *Scanlan v. Sceales* (and certainly there were words of reference); the two other Judges gave no opinion on the point. I think, therefore, that neither *Scanlan v. Sceales*, nor *Bennett v. Anderson*, are any authorities in this case in favour of the defendant.

If I be right in the opinion that the policy alone contains the contract, the question in this case would altogether depend on the

* The following is the judgment of the Court in *Bennett v. Anderson* :—

BLACKBURNE, C. J.

The Court are of opinion that I was wrong in the direction I gave the jury as to the materiality or immateriality of the different questions stated in the proposal of assurance; the verdict must therefore be set aside, but without costs, and without the costs of this motion.

There are two distinct views of this case. The declaration referred to in the policy is incorporated with it, therefore all the representations made in that declaration are matters of warranty, and ought not to have been left as a question for the jury. It is plain also that, whether that instrument be incorporated into the policy or not, it contains a distinct stipulation, which Palmer accepted, that the various matters contained therein were to form the basis of the contract; and if there were any fraudulent concealment, that policy was to be void. By that stipulation both parties have, in my judgment, as effectually concluded inquiring into the materiality or immateriality of the statements contained in the declaration as if they had been embodied in the policy itself; for they have made an express stipulation that the questions therein should be truly answered, and that there should not be either fraud or concealment.

CRAMPTON, J.

I concur. The opinion I entertain is, that this document was incorporated into the policy; it is plainly referred to in it as a declaration, and must be taken to have been the written and attested one; for no evidence is given of any other,

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true construction of that document. The policy contains this proviso, on which the doubt arises:—"If any thing so warranted as "aforesaid shall not be true, or if any circumstance *material* to this "insurance shall not have been truly stated, or shall have been "misrepresented or concealed, or shall not have been fully and "fairly disclosed and communicated to the Company, or if any fraud "shall have been practised upon the Company, or any false statements made to them in or about the obtaining or effecting of this "insurance, this policy shall be null and void." The defendant relies on the latter portion of it, and contends that any false statement made by the assured in or about the obtaining the insurance would vitiate the policy, no matter how frivolous, immaterial or unimportant the falsely-stated fact might be.

This proviso must be considered as the words of the Company, being used for their benefit in avoidance of the contract; and if there be ambiguity in it, it is the Company that should suffer. The policy contains several matters of express warranty, which are distinctly stated in the proposal; and though I do not mean to say that there may not be other matters of warranty in other parts of

neither has any other been produced than that one so proved; therefore unless we overrule *Scanlan v. Seales*, it is plain that in this case all the statements in that proposal are matter of warranty, whereas the case went to the jury as one of representation.

PERRIN, J.

I entertain a good deal of doubt as to the meaning of this declaration, whether it be matter of warranty or representation. I therefore on that do not give any decided opinion. But whether that be so or not, I hold upon the terms of this proposal, and the agreement by the insurer at the end thereof, which says, "I hereby agree that these form the basis of the contract with the Company, and that if there be therein any fraudulent concealment, or untrue allegation, it is void." I take it that in this case, as in every other case of contract, if there be any fraudulent concealment, or untrue allegation, the policy is void, and the party binding himself must stand or fall by its truth or falsehood.

MOORE, J.

I also entertain considerable doubts as to whether this declaration can be incorporated into the policy; if it be in the policy, it amounts to a warranty, and must be adhered to strictly, no matter how unimportant its allegations are; if it be not, unless the allegations be materially untrue, it does not signify. There is not in the policy a clear reference which would import any incorporation; upon that therefore I decline giving any opinion.

the policy, yet it appears to me that the express warranty of some matters furnishes an argument that other matters should not have the effect of warranty, unless the intention that they should be so is clearly and unambiguously expressed.

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In the early part of the proviso it is plain that, in order to give to the concealment or misrepresentation of a fact the effect of avoiding the policy, the fact so concealed or misrepresented must be material. This is the clear language of the early part of the proviso. The misrepresentation of an immaterial fact could have no bearing on the contract which the parties were entering into, and therefore the parties provide that such a misrepresentation shall not disturb the contract. I do not see any substantial difference between a misrepresentation of a fact and the false statement of one; the one is as much calculated to deceive as the other, and I cannot see any rational ground for supposing it to have been the intention of the parties that the false statement of an immaterial fact should be co-operative to destroy the contract; but the misrepresentation of a similar fact should be innocuous and harmless. In reason and common sense, parties who enter into contracts do not introduce into or incur them with matters frivolous or immaterial, and in the construction of contracts I think it should never be held that the parties intended to make the validity of their contract depend on matters irrelevant and immaterial, unless the words used are express and unambiguous.

On these principles I have brought my mind to the conclusion that the true construction of the proviso is this, that the word "material," which occurs in the early part of the proviso, pervades the whole of it; the construction of the whole sentence then would be, "if you conceal a material fact, the policy shall be void; if you misrepresent a material fact, the policy shall be void; if you falsely state a material fact, the contract shall be void." This construction would give effect to every part of it. I further think this construction is fairly borne out by the very words of the part of the proviso on which the defendant relies:—"Any false statement made to them *in or about* the obtaining or effecting of this insurance." It appears to me that the fair import of those words is, the false statement of

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something that might have induced the Company to effect the insurance—that is, the false statement of something material.

I admit that the parties may make the validity of their contracts depend on matters however trivial or absurd; but if such be their intention, they should express it in clear and unambiguous language. If the intention of the Company was that imputed to them by the defendant, what more easy than to have added the words “material or immaterial” after the words “false statements?” the intention then would be clearly expressed, and effect might be given to it. I think that results the most dangerous would follow from the defendant’s construction; the words “false statements” in the proviso would include statements by word of mouth as well as written or printed ones. I feel great difficulty in saying that it is competent for parties to make a contract depend on something not to be found in the contract itself. That general reference to a false statement would let in parol evidence to vary and modify the written contract; and I feel great difficulty in saying that it would be competent for parties to vary their contract by such a mode of reference as that contained in the proviso. If it had direct reference, then the parties would know what they are providing against; but if you say that any false statement will have the effect of avoiding the policy, you leave it to conjecture what it is, and such a construction would trench on the general rule, that you cannot add to, alter or vary a written instrument by parol evidence. A verbal statement of a material fact may perhaps be carried accurately in the recollection; but a verbal statement of an immaterial one usually makes little impression on the memory. But if the defendant’s construction be right, the validity of the policy might, after a long lapse of years, be made to depend on the fallible recollection of what was said as to a matter perfectly trivial and unimportant; and it would be too much to allow a Company to introduce a statement of that general nature, when they had the power of making it distinct and clear.

I have but one observation more to make. It is a clear and settled rule of law with respect to policies of insurance, that the concealment, false statement, or misrepresentation of a material fact, would of itself vitiate the policy, though the policy did not contain

any proviso to that effect. It appears to me that the proviso in the policy is nothing but the introduction of the rule of law to effect a purpose which the mere rule of law would not effect. The rule of law would avoid the policy, but would not forfeit the premiums. In this case the proviso is introduced to accomplish both objects—the avoiding of the policy, and the forfeiture of the premiums.

On the whole, my opinion is, that the judgment of the Court of Exchequer should be affirmed.

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JACKSON, J.

The question presented to the Court by this record is, whether the *materiality* of the answers given by the assured to certain questions proposed to him by the Insurance Company, when about effecting the policy, and upon the falsehood of which the defendants rely as avoiding the contract of insurance, whether, I say, the *materiality* of such answers should or should not have been submitted to the jury? This question has been discussed before us, and also before the Court below, as depending upon another—namely, whether the answers are to be deemed matters of warranty, or matters of mere representation?

With reference to the view I take, I think the question would be better stated thus. Is the truth of the answer made part of the contract of insurance by both parties to the contract? If it be, it affords an answer to both the former questions, and is decisive of this case; for then the answers are clearly matter of warranty, and if so their *materiality* or *immateriality* ought not to have been submitted to the jury.

This case is very important as affecting a larger number of policies. It appears on this record that the deceased Patrick Fitzgerald made a proposal or declaration to the defendants (the Insurance Company), containing certain questions by them, and his answers thereto.—[His Lordship read the proposal and agreement at foot thereof.]

Observe this agreement makes the truth of the statements in the proposal the basis of the contract to be entered into between the parties. This was followed up by the effecting of the policy, and I

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must call attention to the proviso in the policy which I consider the most important part of that document. It may be divided into four clauses; the first, with reference to the insured leaving the country, and other matters not important to the present question; then the second clause is, "or if any thing so warranted as aforesaid shall not be true," and the third clause, "or if any circumstance material to this insurance shall not have been truly stated, or shall have been misrepresented, or concealed, or shall not have been fully and fairly disclosed and communicated to the Company;" and the fourth is, "or if any fraud shall have been practised upon the Company, or any false statements made to them in or about the obtaining or effecting of this insurance, the policy shall be null and void." By inserting this proviso, especially the last clause, I think the Company appears to follow the advice of Lord Kenyon and his Brethren in *Worsley v. Wood*(a), endeavouring thereby to protect themselves from fraud. Lord Kenyon there says:—"Insurance Companies enter into very extensive contracts, and, as we too often see in Courts of Justice, are liable to great fraud and imposition. Common prudence therefore suggests the propriety of taking all possible care to protect themselves from fraud when they make these contracts." And Justice Ashurst adds:—"It is well known that great frauds are practised on Insurance Companies, and therefore it behoves them to take all care to prevent fraud;" and Justice Lawrence says:—"It is a duty the office owes to the public as well as to themselves to take every precaution to protect themselves against fraud." I do not cite that case for the point decided, which was as to a condition precedent in the policy, but for the excellent advice given to Insurance Companies, and which I consider well deserving the consideration of the Courts before whom the construction of these contracts come.

Now what appears on this record? The proposal or declaration bears date the 17th of June 1846, and the policy the 8th of August 1846. Between the 3rd of April and the 17th of June 1846, the deceased applied to no less than eight insurance offices; his proposal was accepted by three and rejected by five; one of these proposals

(a) 6 T. R. 710.

was in May, the very month before the present proposal was made to the defendants. Could all this have escaped his memory? And yet he states in this proposal that he had not offered himself to any other Company. On the same day, viz., the 17th of June 1846, the very day of this proposal, it appears from the evidence that he stated in his answers to the Family Endowment Company his rejection by the National Company; and he gives a reason for his rejection. It appears further that Patrick Fitzgerald died on the 8th of December 1846, four months after effecting the policy. Again, it appears he describes himself in his proposal, and is described in the policy, "nurseryman;" that description is false; he was, in fact, a wretchedly poor labourer; and we find him in the Summer of 1846 applying to Thomas Fitzgerald for very small sums of money. It further appears the plaintiff had not one farthing to take out probate or administration. She was in great distress, and Dowling gave her money to take out administration. He appears on the record to be personally interested, and to have employed and hired the deceased to effect the policies. The deceased also told Fitzgerald the witness, in the Summer of 1846, that he had had a spitting of blood; and it appears also that two of his sisters died of consumption. Dowling further appears to have paid for six certificates of death, and to have paid a trifle for each policy. He obtained six assignments of policies on Patrick Fitzgerald's life, and appears to be a dealer in fraudulent policies.

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I mention these matters as calling on us to look carefully and even jealously in order to see whether we be compelled by any rule or principle of law to ratify so nefarious a transaction. In short, the proposal is a tissue of falsehood and misrepresentation.

I may here add a remark as to the description of the deceased, his profession or business. He is described, as I have stated, in the policy as "a nurseryman;" the falsehood of that description is proved, and no evidence whatever is offered of its truth. That was a matter of express warranty in the policy, and it is remarkable that no objection was taken at the trial on that ground.

I have read from the proposal the agreement of the assured at the foot thereof. Now, see what the Company have inserted in the

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policy which the assured has accepted. First, they have introduced certain matters in the form of express warranty, and in the proviso at foot they stipulate that the falsehood of any of these matters shall annul the policy. Secondly, lest they might be defrauded by the withholding of material facts, or by the fraudulent misrepresentation of other material matters, though not embodied in the questions, to which they require distinct answers, they stipulate that such withholding or misrepresentation shall avoid the policy. But again, the Company had selected certain matters for distinct inquiry, and shaped their questions accordingly. It was for them to decide for themselves how far the information they thus sought was material or not? They deemed them, no doubt, material to guide them in accepting or rejecting the risk. They had a perfect right to stipulate in the policy (and I will say prudence required they should do so) that the logical falsehood of any of these statements, or of any statement made by the assured in or about the obtaining or effecting the insurance, should annul the policy. They were entitled to judge for themselves, and to withdraw from the jury the question of materiality. The question then arises, have they done so? I think they have most distinctly. The proviso, after other clauses, provides, "*or if* any thing so warranted as aforesaid shall not be true, *or if* any circumstance material to this insurance shall not have been truly stated, *or* shall have been misrepresented or concealed, *or* shall not have been fully and fairly disclosed and communicated to the Company; *or if* any fraud shall have been practised on the Company, or any false statements made to them *in or about* the obtaining or effecting of this insurance, this policy shall be null and void, and all monies paid by or on behalf of the said Patrick Fitzgerald on account of the said insurance shall be forfeited."

Now, it is to be observed that this proviso is divided into distinct clauses, each in fact a distinct proviso—each introduced by the words "*or if*," which I consider equivalent to "*provided also*." It is in the third clause alone the word "*material*" occurs. This word affects every part of that clause or proviso. The matters not *truly stated* or *misrepresented*, or *concealed*, or not *fully and fairly disclosed* and *communicated* to the Company, must all be material

in order to annul the policy. The word "material" is not in the fourth clause or proviso. The contracting parties not having inserted it, are the Court to insert it, unless compelled by the rules of fair construction? To do so would be to make a contract for the parties which they have not made for themselves. Does fair construction require the insertion of that word in the fourth clause or proviso? I certainly think not. The Barons of the Exchequer, to whose judgments I shall presently have occasion to refer, appear to have doubted it.

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Now, if a case were required to manifest the prudence, if not the necessity of providing, as the Company have done in the last clause, and of withdrawing from the jury the question of materiality, the facts appearing on the record furnish such a case. One of the questions proposed by the Company is this:—"Has the party's life been accepted or refused at any other office, and if accepted, was it at the usual premium, or with what addition?" The answer to this question is, "No." Now, is it possible to raise a doubt as to the materiality of the subject-matter of this question and answer? If the party had answered truly that he had been rejected at five other insurance offices, it would have put the Company upon inquiry, and afforded them the clue for obtaining information. There must have been a reason for such rejections; the record shows there was. The learned Judge, however, left the question of materiality to the jury, and they found these statements to be immaterial.

There are other matters equally important and material interrogated to in the proposal. As for instance, "whether any member of Fitzgerald's family died of consumption or any pulmonary complaint?" the answer is, "No." It appears, however, in the evidence upon this record, that two of his sisters had died of consumption. But it is unnecessary to go through the instances, one suffices, if the learned Judge's charge as to it was erroneous. Well might one of the learned Barons (RICHARDS) say, in giving his judgment in the Court below, he was astonished that any respectable jury should have found such a verdict, and I agree in the opinion that has been expressed by my Brother MOORE, that if a motion had been made to set aside this verdict it would not have stood for a moment. So

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many people traffic on these fraudulent insurances, and so many who serve on juries become incidentally interested in such policies as creditors or friends of the assured, that Insurance Companies have no security against fraud, unless Courts of Justice shall take care that they have at least the full and fair benefit of their express stipulations. If it be deemed right, let the law be that Insurance Companies shall, at their peril, satisfy themselves upon all points before they grant a policy, and shall not afterwards be at liberty to raise any questions, except forgery, to avoid their liability on policies; but until such be made the law, I conceive that Insurance Companies should have the protection of the contracts they have entered into. But I doubt much the policy of adopting such a rule, seeing how much Insurance Companies must necessarily depend on the statements of the assured.

In this case it appears to me perfectly clear that the Company have expressly stipulated that any false statement made *in or about* the obtaining of the policy shall render it void and forfeit the premiums, and the plaintiff's Counsel plainly so understood it; for the declaration in the first and second counts, framed on the policy, avers the truth of these statements. I do not hold that the effect of the binding clauses in the preceding part of this policy can be done away by any ambiguous or equivocal expressions in the subsequent proviso. My opinion proceeds on this, that the whole policy is the contract of the parties, and that the words of the proviso in the last clause are as distinct and unequivocal as any other part of the policy. I think then the proper and only questions for the jury (on this part of the case) were—first, did the assured make the statements in question? Were they true or false? If false, were they made in and about the obtaining of the policy in question? If the jury found these points with the Company they should have found their verdict for the defendants. But the learned Judge added to these inquiries the question of *materiality*. In this, I think, with great respect for my learned Brother, his direction was wrong, and the exceptions to his charge should have been allowed.

This case appears to have been decided by the learned Barons on the following grounds, viz., that the matters relied on by the Com-

pany are only matters of *representation*, not of *warranty*, the proposal or declaration not being embodied in the policy, nor reference made to the proposal by words free from doubt or ambiguity, and that the words of the proviso, being the words of the Company, should be taken most strongly against them, and most favourably for the assured. It is true the policy is only executed by the Company. These contracts are peculiar in that respect. They are generally in the nature of deeds poll. But if I be right that the proviso is free from ambiguity, this rule of construction does not apply. I am inclined to think that too much of technicality has been introduced in the cases decided of late upon policies on the subject of representation and warranty. It appears to me rather unreasonable to hold that when *statements* in answer to specific questions put by the Company are answered by the assured, and he *agrees* in writing at foot of his answers that these statements shall form the *basis* of the contract, yet that they shall not be deemed any part of the contract of insurance. It would appear more just and reasonable to hold that the proposal signed by the assured was the Company's part, and the policy signed on behalf of the Company the assured's part of the contract. Can it be doubted that the proposal of Fitzgerald refers to this policy? Many of its contents identify them—the name of the Company at top, the description of Fitzgerald, his age, and the amount insured. There is no evidence of any other policy granted by this Company on Fitzgerald's life: *de non apparentibus et de non existentibus eadem est ratio*. If reference from the policy to the proposal incorporates the latter in the policy, why should not reference from the proposal to the policy identify them as part of the same contract?

I think all must feel the justice and good sense of the observations which fall from the Court of Queen's Bench in the case of *Bennett v. Anderson*, referred to by BARON RICHARDS in giving judgment in the Court below. Surely good faith and the absence of all fraud or deceit ought to be held essential to the binding efficacy of all contracts. In the case of *Bennett v. Anderson* the CHIEF JUSTICE is reported to have said—[reads judgment.]—Although the principles stated by the Judges in that case would

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materially bear upon the facts of this case, I do not found my judgment upon them, because, whether the proposal or declaration in this case is to be deemed part of the contract of insurance or not, I find here in this policy itself, in the last clause of the proviso, or rather in the last proviso, the stipulation which binds the assured who accepted the policy, as well as the Company who granted it:—
 “If any false statement be made to the Company *in or about* the obtaining or effecting of this insurance, this policy shall be null and void, and all money paid on account of it shall be forfeited.”

Upon the whole then I have arrived at the conclusion, without, as I conceive, contravening the principles of law deducible from the decisions on questions of insurance, or rather, I should say, in strict accordance with them, that the mere logical falsehood of a statement made in and about the obtaining of this insurance should annul this policy according to the true construction of the proviso, without regard to the question of *materiality* or *immateriality*. I should consider it a painful duty had I formed a contrary opinion, and found myself compelled by authority to affirm the judgment, and thereby to give effect to what appears to me on this record to have been as gross a fraud as I believe was ever practised on an Insurance Company. The statements in question, however, were not only logically untrue, but false, to the knowledge of the party making them; and if the truth had been declared, it would manifestly have been most material in enabling the Company to institute inquiries, and to judge of the risk to be insured against, although the jury have found those statements to be immaterial. My opinion therefore is that the learned Judge should have charged the jury to the effect required by the Counsel for the defendants, as stated in the exceptions; that not having done so, but having left the question of the materiality to the jury, the exceptions should have been allowed, and therefore the judgment overruling them should be reversed accordingly.

LEFROY, B., after stating the exceptions, proceeded to say:—

The questions arising upon those exceptions is, whether the subject-matter of them consists of matter of warranty? and that

depends on the questions whether these several particulars constituted part of the contract between the parties; that is, whether they were embodied in the policy in terms, or by such a distinct reference to the proposal as to ascertain that it, and consequently every thing contained in it, were matters for the truth of which the insured engaged, irrespective of their materiality? That this is the rule by which the validity of these exceptions is to be tried, I apprehend there can be no doubt. It was so laid down in *Scanlan v. Sceales*, agreeably to former decisions. In that case the matters there in question were not in terms introduced into the policy; but the policy referred to the proposal in which they were contained, as "Deposited in the office of the Company, and thereby declared to be the basis and conditions of the contract;" accordingly it was held in that case that the statements contained in the proposal were as much matter of warranty as if they had been in terms set out in the policy,—the document in which they were contained being identified and ascertained by the reference to it in the policy. But in the present case the proposal is not referred to by the policy by any specific identification.

It has indeed been argued that the words at the end of the proviso may be considered as a sufficient reference to the proposal. The words on which the argument is founded are these, "or any false statement made to them in and about the effecting the insurance." But there is no authority for giving to words so vague and general the effect of identifying the proposal or any particular matter contained in it as the object referred to. These words apply equally to statements written or verbal—to falsehood known or unknown—to matters material or immaterial. It would also be inconsistent with other parts of the policy to hold these words as intended to create a warranty; if we look at the context and apply the rule "*noscitur a sociis*," we shall find this part of the proviso expressly referring to "any circumstances *material*, or in respect of which *any fraud* should have been practised," which would have been wholly unnecessary if a warranty was intended to have been given as to every circumstance or statement that occurred in or about effecting the policy. Indeed, if we look back to the beginning

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of the policy we shall find a warranty in express and technical terms against a variety of specified diseases, winding up with "any disease or disorder tending to the shortening of life," followed by these words in the proviso, "if any thing so warranted as aforesaid should not be true," contrasted with the words, "or if any circumstances *material* to the insurance should not have been truly stated," &c., which seems plainly to confine the warranty to things so warranted as *aforesaid*, and to show that it was not intended to apply to any thing *thereinafter* mentioned, especially to things incidentally relating to the health of the insured, as to which the Company had guarded themselves by a full and technical warranty. It appears to me that the true object of the proviso was not to enlarge the warranty in the previous part of the deed (which would not be its legal or proper province), but to amount to this, that notwithstanding the Company having guarded themselves by the *warranty* as to certain specified matters, the insured should be liable for any wilful or fraudulent misrepresentation, or concealment of any other things *material* in or about effecting the insurance. It has also been argued that the agreement at the end of the proposal amounts of itself to a warranty of every thing stated in the proposal, and that the matters in the exceptions are to be found there. This would be so if the policy referred to the proposal so as to show beyond a doubt (as was done in *Scanlan v. Sceales*) that it was intended to make the proposal "the basis and conditions of the contract." But the proposal is a separate and independent document, not of itself forming the contract between the parties on which the suit is depending, and can only be made so by a distinct and sufficient reference. On the whole, I cannot come to the conclusion that it was the intention of the parties to make the statements contained in the exceptions matter of warranty, or to subject the insured to any liability, unless they were material as well as false. The jury may not have been warranted in finding the verdict they have done; but the proper course to remedy that would have been by a motion for a new trial; but in my opinion the charge of the learned Judge was right, and the judgment of the Court below should be affirmed.

BALL, J.

Whatever may be the true construction of the terms, "in case of any false statement in or about the obtaining or effecting of this insurance," two consequences must follow by the express terms of the policy from the breach of that proviso. First, the policy is void; and secondly, the premiums are all forfeited.

Now, it is to be observed that only for this *express* provision, although the assured may have made statements untrue *in fact*, and by reason of their having amounted to a warranty fatal to the policy, yet if not false *to his own knowledge*, he may have recovered back the premiums he had paid: *Feise v. Parkinson* (a); whereas the effect of this proviso is to strip him of that right, whether the statements be ethically or logically false; that is, whether false to his own knowledge or not. The case of *Ducket v. Williams* (b) appears a direct authority to this effect. Accordingly, if any statement were made by the assured in this case "in or about the obtaining of the policy," which turned out to be false in point of fact, though he believed it to be true, and was altogether guiltless of any intention to deceive, he thereby incurred the forfeiture not of the policy only, but likewise of all the monies he may have paid from time to time for the premiums. It is under such circumstances that the Company contend that the assured is to incur this double forfeiture, not merely if the false statement were material to the insurance, but even if it were altogether immaterial, amounting it may be to nothing more than idle gossip, in case it related to or was made "in or about" the effecting of the insurance.

If such be the true construction of the proviso, the Company are of course entitled to the benefit of it, however harsh it may be in its consequences to the assured; but it strikes me that, before we adopt it, we should be satisfied by unequivocal evidence that such was the intention of the parties to the contract. Have we such evidence in this case? The Company rely upon the proposal of the assured, with the agreement at foot of it, as well as upon the contents of the policy itself, as establishing their construction of the proviso.

(a) 4 Taunt. 640.

(b) 2 Cro. & Mees. 35.

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But do these documents import that a representation by the assured, purely immaterial, and in no way calculated to induce the Company to take the risk, if it turned out to be unfounded, though the assured believed it to be true, was intended to operate as a forfeiture as well of the policy as of the premiums paid on foot of it? First, as to the proposal. This document contains a series of questions put to the assured on behalf of the Company, together with his answers thereto. These questions and answers appear to be for the most part more or less material to the insurance, though the materiality of some few of them is, perhaps, not apparent. Then comes the agreement of the assured at foot of the document, to this effect, that the particulars thereinbefore mentioned should form the basis of the contract between him and the Company, and it proceeds thus:—"And if there be any fraudulent concealment or untrue "allegation therein, or any circumstance *material* to this insurance "shall not have been fully communicated to the Company, or there "shall be any fraud or mis-statement, all money which shall have "been paid on account of this insurance shall become forfeited, and "the policy be void."

It thus appears that in this document, purporting to contain the basis of the contract between the parties, the stipulation on the part of the assured, the breach whereof is to avoid the policy, has relation expressly either to matters of fraud, or other circumstances *material* to the insurance. Then comes the policy itself, which contains the contract, as finally settled between the parties. It commences by selecting from the proposal of the assured, which purported to contain the basis of the contract, certain of the statements made by him in answer to the questions put to him by the Company, and these selected statements it constitutes in terms matter of warranty, omitting all mention of the other answers given by the assured, and amongst them, of the two which are the subject-matter of the exceptions in this case.

The policy then proceeds to bind the Company to the payment of the sum insured, on the terms of the premiums being duly paid, with a proviso, nevertheless (among other things) that "if any "thing so warranted as aforesaid shall not be true, or if any circum-

"stance material to this insurance shall not have been truly stated, or shall have been misrepresented or concealed, or shall not have been fully or fairly disclosed or communicated to the said Company, or if any fraud shall have been practised on the said Company, or any false statements made to them in or about the obtaining or effecting of this insurance, this policy shall be null and void, and all monies paid by or on behalf of the assured on account of this insurance shall become forfeited."

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It is contended on behalf of the Company that, by reason of the terms of the above proviso, "if any false statements shall be made to the Company in or about the effecting of the insurance, the policy shall be void," the province of the jury was to consider only whether the answers given by the assured to the questions, whether any of his near relatives had died of consumption, and whether his life had been accepted or refused at any other insurance office, were false, and that the materiality of those answers was not for the consideration of the jury at all, or in other words, that the effect of the last-mentioned terms of the proviso was to make the truth of those answers matter of warranty, instead of matter of representation only, as insisted upon on behalf of the assured.

Now, it appears difficult to understand how the Company, in selecting from the proposal the particular answers of the assured, which are made expressly the subject of warranty, should have deliberately omitted from that class the answers in question, and yet should have intended to comprise them by implication as matters of warranty under the general words—"any false statements made in or about the effecting of the policy." If the Company had intended to have made the subject of those answers matter of warranty, it could hardly have been expected that they would have left the existence of such an intention to be conjectured from loose general words, while they advisedly excluded them from the enumeration of the subjects of warranty expressed in the instrument.

But again, the particulars of the proviso are, without exception, either matters already warranted in express terms by the policy, or circumstances expressed to be material to the insurance, or frauds

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practised on the Company, which, of course, must have been material to the insurance; and it is after this enumeration of the circumstances whereby the policy will be avoided, that the clause in question occurs—"if any false statements shall have been made to the Company in or about the effecting of the insurance." And it is contended that, while all the antecedent portion of the proviso had reference to circumstances material to the insurance, these loose terms, "any false statements in or about the effecting of the insurance," should be held to comprise statements which may be altogether immaterial; although nothing but what was material can be collected to have been within the contemplation of the parties, from any thing expressed in the context of the proviso.

But to consider the frame of the clause more particularly, it runs thus:—"If any fraud shall have been practised upon the Company, "or any false statements made to them in or about the effecting of "the insurance." I read it so:—If any fraud shall have been practised upon the Company *in or about the effecting of the insurance*, or any false statements shall have been made to them *in or about the effecting of the insurance*—making these latter words apply to each member of the clause, inasmuch as it is not fraud generally, or in relation to other matters, or false statements generally, but only fraud or false statements in relation to the insurance, that is to avoid the policy; then, if the clause be so read, it would appear to be the natural construction to hold that, where in the same sentence two matters are provided against, both described with the same qualification, and both producing the same effect, and where there is nothing in the context to lead to the inference of an intention that they should not be the same in character, the principle of "*ejusdem generis*" shall be applied; and where one of them is expressed as fraud, and the other as false statement, the latter shall be deemed to import false statement of a fraudulent character, that is to say, material to the effecting of the insurance.

Again, the portion of the proviso antecedent to the clause in question provides carefully against the false statement of circumstances *material* to the insurance; but if the "false statements," afterwards mentioned in the clause in question, were intended to

import false statements, *whether material or not*, it would appear reasonable to expect that the clause would have so expressed it.

But independently of the foregoing observations, it must be recollected that the policy in question is the instrument of the Company, and executed by them alone, prepared at their instance, and containing the language dictated by them, and that the proviso in which the clause in question occurs is introduced by them into the policy for their own benefit, and to relieve them from the obligation of performing their contract upon the occurrence of certain contingencies; under such circumstances it would seem to be just and reasonable to construe the ambiguous or uncertain language, which they may have thought fit to employ, most strongly against them, and most favourably to the assured.

It is said on behalf of the Company, that we are bound to give their construction to the clause in question, or that otherwise the terms, "any false statements in or about the effecting of the insurance," will have no meaning except what was before expressed. But I see no difficulty in considering these terms as a more pointed and emphatic expression of what was previously contained in the proviso, and not as intended to convey a different meaning from what was before expressed.

Upon the whole, I am of opinion that the exceptions in this case should be overruled, and the judgment of the Court below affirmed.

PERRIN, J.

I concur in the opinion expressed by my Brothers MOORE, LEFROY and BALL. It is not necessary that I should go in detail through my reasons. I shall merely say, that it appears to me that the statement, the subject-matter of this exception, is, according to the authorities so clearly laid before the Court, matter of representation, and no part of the contract or warranty; and that the rules laid down by my Brother MOORE clearly show that matter of representation, although false, does not vitiate the policy; mere falsehood in a statement, unless it be material to the contract in or about obtaining the policy, is not fraud. The materiality was properly left to the jury in order to warrant them in the conclusion they have come to.

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I am not to uphold or approve of the verdict they have found, and although I do not approve of it, and am surprised at the course taken by them, yet I am merely to pronounce my opinion on the exceptions taken to the charge of the learned Judge, and I think it would be most dangerous to depart from the rules with respect to representation and warranty, and to confound one with the other, by showing that what amounts to misrepresentation only should vitiate the contract. You could not say where the Court should stop if a general reference, such as the present, were to be taken into consideration. I do not see how, if the view contended for by the Counsel for the Company were adopted, we could exclude the consideration of any statement, whether by parol or otherwise, and no matter how trivial or immaterial.

I am therefore of opinion that the exceptions ought to be overruled, and the judgment of the Court below affirmed.

TORRENS, J.

In this case I am of opinion that the judgment of the Court below should be affirmed. It is unnecessary for me either to state the pleadings, or to advert to the facts of the case, which have been stated and commented on by my learned Brethren who have preceded me; and I shall therefore confine my observations to what I consider to be the important and, I might safely say, the sole question in the case, namely, the true construction of the policy entered into by Patrick Fitzgerald with the United Kingdom Life Assurance Company, on the 8th of August 1846.

It appeared in evidence that the policy, so executed by the Company, was granted by them on the faith of a certain proposal made by Patrick Fitzgerald, on the 17th of June 1846; and although it is stated in the proposal that the particulars of it were to form the basis of the contract between the parties, yet in the policy itself no allusion whatever is made to the proposal—the simple recital in the policy being, that Patrick Fitzgerald was desirous of making an insurance for a certain sum on his life; and therefore this case is altogether free and unclogged from any question which might arise as to how far the proposal, or any declaration of the assured, founded

upon it, is or is not incorporated with, or forming a part of, the contract entered into by the policy itself.

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The sole question then arises upon the construction of that policy, and I cannot bring myself to any other conclusion but that the principles which were announced by all the Judges in the well-considered case of *Scanlan v. Sceales* (whether of those who were of opinion that the judgment of the Court below should be reversed, or of those who were of opinion that it should be affirmed) ought to govern the case at Bar. The majority of the Judges held in the case of *Scanlan v. Sceales* that, from the fact of the proposal and the declaration of the assured being, as it were, incorporated in the policy, the whole was to be construed as forming one instrument; and adverting to the insertion of the declaration of the assured, it was decided that it became a binding engagement of warranty on his part, equivalent to the warranty of the specific statements, upon which a distinct guarantee of warranty was given. The Judges who composed the majority in that case were of opinion that, if the proposal and declaration of the party assured had not been inserted in the policy, the statements in it, not expressly warranted, would have been matter of representation; and the Judges who composed the minority held that, notwithstanding the incorporation of the declaration and proposal of the assured into the policy, it did not vary the construction of the statement, being matter of representation only; and therefore I think it is fair to conclude that, if we had now the benefit of the opinions of those Judges who composed the Court upon the argument of *Scanlan v. Sceales*, there would have been an unanimous judgment in favour of the plaintiff below in the present case, formed on the principles and reasoning of all the Judges in the case referred to.

Let me now advert very shortly to the policy itself, premising (what ought never to be lost sight of in the construction of these instruments) that it is the deed of the Company—their deed entered into by them for a valuable consideration paid by the assured; and therefore, according to the well-known maxim of our law, should be expressed in clear and unambiguous terms; and if ambiguity should exist, the words are to be construed most strongly

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against him or them whose deed it is. The policy, as I before observed, does not set out any proposal or declaration of the assured; it simply states that he is desirous of making an assurance for a certain sum, and then proceeds to recite what are the facts which he expressly takes upon himself to warrant. First, his name, residence and occupation; second, his age; third, that he was not employed in military or naval service; fourth, that he has not had the small-pox; fifth, nor the cow-pox; sixth, nor the gout; seventh, nor has been afflicted with fits or convulsions, asthma, insanity, or spitting of blood; eighth, that he has no habitual cough or disease tending to shorten life; ninth, that he has led a temperate life; tenth, that he has a sound and good constitution. Now, upon reference to the policy it will appear that out of twenty-seven questions, propounded to the party assured by the Company, the foregoing ten queries were selected as matters of specific warranty, which the assured "hath warranted and doth warrant," and which therefore, we are to presume, the Company thought most important to provide for by a strict warranty, that would bind the party, whether the facts were material or immaterial; and therefore it is fair to infer that the Company, in the deed prepared on their behalf, drew the distinction, well known in insurance cases, whereby they protect themselves by warranty against those matters which, in their judgment, might or might not be material, and left unwarranted those other matters comprised in their extended list of queries, respecting untrue statements which might or might not vitiate the policy, according to their materiality or immateriality on a question of the kind being raised—else I am at a loss to conjecture why they should not have included the whole category of queries in their express contract of warranty, without having selected those which I have enumerated; and this consideration alone would lead me to the conclusion, that it was the intention of the Company to secure themselves by warranty in the one case, and leave open the question of the infraction of the other statements as depending on their materiality; else it must be attributed to them that they were spreading a net to catch the unwary, by giving the same effect to an innocent and unconscious deviation from literal truth, as if it

were the infraction of a specific warranty. The contract for warranty is complete by express words as to certain items; it is loose and ambiguous as to others; and yet the Company seek to have the benefit, in the latter case, of that legal precision of language which alone pervades the first.

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I next come to the proviso in the policy itself, which appears to me to confirm the view I have taken of the previous part of the contract. Now, adopting the division of this proviso as stated by my Brother JACKSON, the first member of the proviso relates to events which may or may not occur, so as to make the policy void; and it is to be observed that none of those matters are contained in the contract of warranty, nor is there any reference as to their materiality, thus, undoubtedly, leaving the question open as to the future occurrence of those prohibitory covenants, and the circumstances under which those covenants might be held to be infringed. The second member of the proviso relates to the warranty previously entered into in the following words:—"If any thing so warranted as aforesaid shall not be true, then the policy shall be void;" referring thereby, in my judgment, to the previous words in the contract of warranty relating to the ten queries I have before adverted to, and which are the matters "so warranted as aforesaid."

Then comes the third important member of the proviso, which is as follows:—"Or if any circumstance material to this insurance shall not have been truly stated;" or, as I read it, any circumstance (material to this insurance) shall have been misrepresented or concealed, or if any circumstance (material to this insurance) shall not have been fully and fairly disclosed, or any false statement (material to this insurance) made to them in or about the effecting of this insurance. Now, in this third member of the proviso the word "material" occurs for the first time; it is not to be found in the warranty, or in the prohibitory covenants, and in my opinion its position at the commencement of the third member of the proviso requires that, in legal construction, the word "material" should be read with each member of that portion of the proviso. The word "material" governs and serves through every member of that sentence, and should control the loose meaning which another construction would let in.

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Upon the whole of this case I therefore am of opinion, that the learned Judge was right in the direction he gave to the jury; but I am also of opinion that the verdict was altogether wrong, and that the plaintiffs in error have mistaken the proper course which should have been adopted for setting that verdict right, and that the judgment of the Court below ought to be affirmed.

PENNEFATHER, B.

Were it not that there is a considerable difference in the Court as to the judgment that ought to be given, I would not, after the very able arguments of my Brethren with whom I coincide, and especially after the lucid judgment of my Brother MOORE, feel called on to say any thing in this case, except to express my concurrence in the substance of what has been stated by my learned Brethren; but in deference to the opinion of those with whom I have the misfortune to differ, as well as from what may be due to the parties and to the public, it may be right that I should say somewhat of the reasons that influence my opinion.

It is quite clear that the contract here is to be found in the policy and in nothing else. That instrument does not refer to any other document, nor is there in my mind any matter not expressly referred to by it admissible for its construction. The course of the proceeding with regard to the Company is this:—they have a printed form termed "a proposal," and although it comes from them in the first instance, it is generally adopted by the party who seeks the insurance. The Company require of the person seeking the insurance that he should answer certain questions, in the present case twenty-seven in

number; and they require him (at foot thereof) to sign a writing, stating that the particulars mentioned in the proposal shall form the basis of the contract between the assured and the Company, and that if there be any fraudulent concealment or untrue allegation contained therein, or that any circumstance material to the insurance shall not have been fully communicated to the Company, or that there shall be any fraud or mis-statement, all money which shall have been paid on account of the insurance shall become forfeited, and the policy be void. The person, proposing to have the insurance effected, thereby binds himself that every thing contained in this printed document may form the basis of the contract; but it rests with the Company to say to what extent it shall be adopted. He agrees that it shall be the basis or foundation of the contract, and that the Company may make the entire part of, and may incorporate every thing therein contained, in the policy. It rests then with them to say how much shall be so incorporated. Then, how have they acted in this case? They do incorporate into the contract or policy certain portions of this proposal and of the written answers, and they declare that as to so much it shall be matter of warranty, and, so far as it is so incorporated, so far the insurer is bound to strict and literal compliance; so it might be if the whole of the proposal were expressly referred to by the policy. Then is the proposal, save so far as it is introduced into the policy, to be disregarded altogether in the construction of the contract? It is not; but in my opinion it is to be looked at in a very different light from that in which it is now relied upon on the part of the Company. They select certain parts of the proposal and insert them into the policy, excluding therefrom, as matters of warranty, the parts not so inserted, and content themselves with another test as to those parts so excluded. By stipulating that certain answers should be warranted, they thereby imply that the other matters, which might have formed a portion of the contract, are not to be parts of it, and that the policy is effected without regard to their being considered as matters, to the exact and literal truth of which the insurer is to be bound. The queries in this proposal amount to twenty-seven; twelve of them have been embodied in the policy; the last of those so introduced is marked

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 and good constitution, and is he now in a good state of health?"
 And the reply thereto is, "He is." Several of the previous queries
 related to the health of the party to be insured, and the remaining
 queries are left at large to be determined on whether they are
 material or not. One is with respect to his medical attendant;
 another whether his parents be living or dead. That is not, it may
 be presumed, a question of such a nature, the answer to which, if
 untrue, ought to vitiate the policy. Then follows:—"Did any of
 "the party's near relations die of consumption, or any other pul-
 "monary complaint? and has the party's life been accepted or
 "refused at any other office? and if accepted, was it at the usual
 "premium, or with what addition?" On these two latter the
 direction of the learned Judge was called for, and to these excep-
 tions are pointed, the jury having found that the answers to them
 were not material. It appears to me then that, unless there be
 something in the words of the proviso, which unquestionably forms
 part of the contract, that ought to control this altogether, the Judge
 was right in his direction.

We have heard a good deal of the verdict given in this case. I
 have endeavoured to shut my eyes as much as possible to the evi-
 dence lest it might have any effect on my judgment. I have read
 merely as much of the record as would be necessary to enable me to
 consider the question now before the Court; and as to whether the
 jury came to a wrong conclusion, it is not for me to say. I there-
 fore pass no opinion upon this. We have merely to decide a matter
 of strict law, quite irrespective of the merits of the case and of the
 merits of the verdict, as to which I do not give the slightest inti-
 mation of opinion, it being in my mind quite outside the case.
 Undoubtedly Insurance Companies are much exposed to frauds,
 and have received very good advice from Lord Kenyon and other
 Judges how to guard themselves. They may incorporate the whole
 of the proposal and answers, in terms, in the policy, or may make
 them part of the policy by express reference, and so avoid all
 question save a literal compliance. But what has been done in
 this case? The policy does not refer in any manner to the pro-

posals, but it selects parts of it and of the answers, which it declares to be matter of warranty, while the other parts of the proposal and the answers are left to be determined on the principles of representation.

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With regard to this question the law is well settled as to the distinction between warranty and representation, and I do not find it necessary to refer to the cases which have been so fully commented on.

Now as to the proviso. It states that "if any circumstance material in this insurance shall not have been truly stated," and it is said that the word "material" is necessary to be introduced into this part of the clause, because that part refers generally to something that has not, or may not, have been truly stated, and therefore the word "material" is necessary to give sense to that part. I agree to this. The proviso goes on, "or shall have been misrepresented or concealed, or shall not have been fully and fairly disclosed." So far it is conceded that the word "material" is to be considered as included in the clause. It then proceeds, "or if any fraud shall have been practised." Here it is said the word "material" is to be dropped, and that it is not to be resumed. Why should it be dropped? or if dropped here, why should it not be resumed? The Company had the power of making these matters necessary to be strictly proved by introducing them into the policy as the subject matter of warranty, and they have not done so. Is it to be supposed that the Company, dealing fairly as between man and man, meant thereby to include an untrue immaterial statement, which they had designedly excluded from a former part of the policy? Is it to be contended they intended to say that a false statement respecting the age or death of the parents of the insured should vitiate the contract when they had designedly omitted that from the policy? The same observations apply to the other questions. We ought not to extend the instrument beyond the words of the speaker, *Verba accipienda fortissime contra proferentem*. It would be unjust to the Company to attribute to them that kind of contrivance; they ought not to be permitted, without express and clear words, to make a warranty, which would have the effect of avoiding

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the policy upon the untruth of an immaterial statement, and of enabling them thus to retain a number of premiums which no law could compel them to refund, and to say to the parties, not only shall we keep what we have already received, but we will not give to your family the provision intended for them. The words of this contract are the words of the Company; they are the authors of it; and it would be imputing to them an endeavour surreptitiously to procure that which they had expressly excluded.

It appears to me, therefore, that the word "material" must be considered as running through the entire sentence, and that it is to be included in the latter part of it, otherwise the sense would be incomplete. The decision in the present case is not of consequence beyond the sum in dispute, as the Company can for the future protect themselves.

Upon these grounds I am of opinion that the judgment of the Court below ought to be affirmed.

PIGOT, C. B.

Two questions have been argued before us:—First, whether the policy can be so connected with the written declaration as to make the declaration, and the stipulations as to false statements contained in it, part of the policy and matter of warranty? it being, I believe, conceded that, if the declaration formed part of the contract, and was matter of warranty, the question of the materiality of the falsehood ought not to have been left to the jury. Secondly, whether, upon the true construction of the policy itself, a false statement made by the assured, in or about the obtaining of the policy, vitiated the contract, although the falsehood was immaterial?

Upon the first of these questions I stated, in my judgment in the Court below, my reasons for holding, upon the principle of the authorities which have been cited by my Brother MOORE, that it was impossible to treat the declaration, which was a separate instrument, not referred to in the policy, as any part of this contract of insurance. These principles have been so fully and clearly expounded in the judgment which has just been delivered by my Brother MOORE, that I shall not weaken his exposition by repeating

it in my own language. I fully concur with him in thinking, with every respect for the opinions which are represented as having been expressed by some of the learned Judges in the case of *Bennett v. Anderson*, that it would be impossible to connect the declaration of the 17th of June with the policy of the 8th of August by that parol proof which, ever since the cases decided in Lord Mansfield's time, and reported in *Doug. Reports* and *Cowp. Reports*, has been rejected for the purpose of connecting a policy with collateral writings, where the collateral writing is not referred to by the policy. If the case therefore depended upon this first question alone, I should be of opinion against the exception, and in favour of the judgment of the Court below.

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But the question remains, what is the meaning of that part of the policy which provides against "false statements made to them" (the Company) "in or about the obtaining or effecting of this insurance?" These words occur at the close of a proviso, which is in the following terms.—[Reads the proviso.]

The subject of this proviso is plainly two-fold. First, it is framed to guard the Company against the existence of some, and the non-existence of other, specified states of fact, which are made the subject of express warranty. Secondly, it is framed to guard against other matters not specified, but which, if known, might influence the Company's estimate of the proposed risk.

The first part provides, that if certain specified events shall happen, or if any thing so warranted as aforesaid (in the previous part of the policy) shall not be true, the policy shall be void, and the premiums shall be forfeited.

The second part provides, that a similar result shall follow from misrepresentation or concealment of any circumstance material to the insurance, from fraud, or from any false statements made to the Company in or about the obtaining or effecting the insurance.

In its terms this second part of the proviso professes to guard against three things; first, misrepresentation or concealment of what is material; secondly, fraud; and thirdly, false statements in or about the obtaining or effecting the insurance.

These three matters appear to me to be perfectly distinct from

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each other, and to be subjects on which the Company may, for their security, have deemed it fit to provide separate and distinct means of precaution. Against misrepresentation or concealment of a material circumstance, and against fraud, they were to a certain extent protected by the law, which, independently of positive contract, would have avoided the policy for either of those causes. This Company choose to stipulate in positive terms, that in either of those events not only the policy should be void, but further, the premiums should be forfeited. But in addition to this the Company may have deemed it fitting for their security to stipulate that, although they might never discover, or might never be able to prove, that a material fact was misrepresented or concealed, or that the insured was guilty of conduct in reference to the insurance which amounted to fraud, yet they would contract with the insurer only, upon this further condition, that he should maintain truth and sincerity in his whole dealing with them in reference to the effecting of the policy. They may have determined, as a rule of precaution for their own conduct, that if they should find him guilty of voluntary falsehood in any one part of that dealing, he should be treated as a person likely to deceive in others. They may have determined that if they should discover such falsehood before the policy was effected, they would treat the falsehood as attaching such suspicion to the character of the party seeking the insurance and such risk to their dealing with him, that they would decline to deal with him at all; and they may have therefore resolved to place themselves by their contract in the same position on a subsequent discovery of the falsehood as if they had ascertained it before they had entered into the policy. And in furtherance of those views they may have determined so to stipulate as to make wilful falsehood the test by which the invalidity of the policy should be tried, for the very purpose of not leaving it to a jury to determine upon the materiality or the fraud of the falsehood.

There may or may not be too great strictness in so contracting. It may or may not be imprudent in the assured to accept a policy upon such a condition. But in my opinion there is nothing in such condition inconsistent with law, contrary to reason, or improbable as a

part of an insurer's contract. Does then the proviso in question, or does it not, contain words sufficiently clear to decide the three distinct matters which I have mentioned as conditions of this contract of insurance?

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Now, it appears to me that if the words of the second portion of the proviso be considered in their ordinary meaning, and by reference to their grammatical context they express those three conditions in clear and unambiguous language, there are three clauses, each of the two last of which is connected with the former by the designation "*or*;" first, "*or* if any circumstance material in the insurance shall not have been truly stated, or shall have been misrepresented or concealed, or shall not have been fully and fairly disclosed and communicated to the Company; secondly, *or* if any fraud shall have been practised upon said Company; thirdly, *or* any false statement made to them in or about obtaining or effecting this insurance." In the last clause or member of this sentence there are annexed to the terms, "or any false statements in or about the obtaining or effecting this insurance," no qualifying or explanatory words. The terms are general. Taken by themselves they are clear and express. They direct that falsehood in any statements made in or about the obtaining or effecting the insurance should annul the contract and forfeit the premiums.

The only modes by which, as I understand the argument, those words are alleged to be qualified or controlled are two; first, it is said that the idea of materiality expressed in the previous part of the proviso is to be treated as carried on to the last member of it, and that this last member is to be read as if the term "material" were inserted.

To this I think there are several answers. First, the term "material" cannot by any collocation of the words actually used be connected with the terms "false statements," without importing into this last clause words in addition to those which the contractors have themselves chosen. So to add to terms in themselves general, and sensible in their generality, a qualifying term which would alter what is expressed, appears to me to exceed the bounds of construction, and to make, not to interpret, a contract. Secondly, between

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the clause in which the term "material" qualifies misrepresentation or concealment, and the clause dealing with "any false statements," there is interposed the condition relating to "fraud." There is no more reason for annexing the preceding idea of materiality to that of falsehood than for annexing it to that of fraud. Yet it is plain that both cannot be added without absurd tautology. To add as a condition that the policy should be avoided by a fraudulent and material false statement in or about the obtaining or effecting the policy, would be a useless waste of language, when it was previously declared that any fraud practised on the Company in or about the same thing should nullify the contract. Indeed the interposition of the general and unqualified condition or reference to "any fraud," between the clause referring to materiality and that referring to "any false statement," goes far to indicate that the framers of the condition had ceased to deal with materiality at all when they arrived at this part of the proviso. Thirdly, if the term "material" alone be treated as added to the terms "false statements," still this will involve a useless tautology. If "material false statements" mean "material statements wilfully false," then they mean fraud which was fully provided for in the second member of this part of the proviso. If they mean "material statements inconsistent with the fact, though not wilful," then they are amply provided for by the first member. In any of these views the proposed construction would offend against the rule, that when there is nothing unreasonable or inconsistent with the rest of the contract in so doing, effect ought to be given to every word. This test of construction appears to me decisive as to the meaning of the term "false." It is true that in *Duckett v. Williams* (a) the word "untrue" was construed to mean not what was wilfully false, but what was inconsistent with fact, that is, what was not ethically, but logically, untrue. That decision, however (like most determinations on the import of a written instrument), was made upon the context and general import of the document then before the Court. In this policy, with which we are now dealing, we find in the preceding part of the proviso a stipulation against any circumstance material to the insurance being

(a) 2 Cr. & M. 381.

untruly stated, or being misrepresented or concealed. In the subsequent part of the proviso we find the words "any false statement;" and unless the latter part be so construed as to make it mean precisely the same thing as the former, we must give to the term "false" the more obvious meaning of being untrue to the knowledge of the party by whom the false statement is made. If this be the true import of the words, many of the arguments (and they appear to have great force) founded upon the obvious supposed unreasonableness of stipulating against immaterial and involuntary untruths, and against mere mistakes of the party seeking the insurance, are removed. The whole proviso will then be, upon the construction which I am indicating, sensible and consistent. It will make the policy void—first by the breach of the stipulation respecting matters expressly warranted; secondly, by the misrepresentation or concealment of a material fact; thirdly, by fraud, and fourthly, by wilful falsehood in the dealing of the party who seeks to be insured, and upon whom a personal disability is imposed by reason of his violation of that good faith which is of the essence of an insurance contract.

The other mode in which the words "any false statement" are contended to be qualified (and in which there appeared to me at first to be some force) is by arguing that the very terms "in or about the obtaining or effecting this policy" necessarily imply statements contributing to the result of obtaining or effecting the policy; and that such statements could not have contributed to that result unless they influenced the Company, and were therefore material. If this be so, still it would be questionable whether the jury ought to be directed to do more than merely to take into account the materiality of the statement, in considering as a matter of fact, whether it was really made in or about the obtaining or effecting of the policy—that is to say, in considering whether it contributed to obtain or effect it. But assuming that the argument of the plaintiffs below was right, and that it was not material, it was not ancillary to the obtaining or effecting the policy, still the question remains, do the words "in or about the obtaining or effecting the policy" point to a result in the getting of the policy? or to the

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In their ordinary and obvious meaning, "in or about" seem synonymous with "in relation to," or "of and concerning." To read them as if they were followed by the words "and contributing to the obtaining and effecting the policy" appears to me to add new terms, indicating a new idea in addition to what is expressed by those particles. And that is in effect to change the condition as expressed, by adding a qualification not included in its terms. This mode of construing the words is subject to precisely the same test to which I before alluded. The words so construed would indicate precisely what was contained in the previous clause of the condition relating to misrepresentation or concealment of what was material, and would be useless tautology—a construction not to be adopted if, reasonably and consistently, the additional words can be interpreted as introducing a distinct condition sensible in itself.

I have entered into this verbal discussion, not because I deem it necessary for showing the grounds of my own judgment, but because a good deal of argument has been applied to construe the few terms on which the controversy arises by a reference to the other parts of the proviso. To my understanding it is sufficient that I find words plainly, and in their ordinary acceptance, and by grammatical construction, indicating "*any* false statement made in or about the obtaining or effecting of the policy" should nullify the contract, and forfeit the premiums. That these general words are uncontrolled when they appear by any qualifying terms connected with them; that a purpose not improbable, or unreasonable, or inconsistent with any thing expressed in the contract is sufficiently indicated by them, namely, to guard the Company in their dealing with the assured against *any* falsehood in his dealing for the policy, and that a more restricted construction cannot be given to the clauses without treating them as if words were inserted which the Company (whether it was or not prudent in the insurer to acquiesce in their so doing, is wholly immaterial) have chosen to exclude from their contract.

It has been urged that the policy can only be vitiated on the ground either of warranty or of representation, and that in this

case the policy cannot be vitiated by reason of warranty, because there was none in the policy, nor by reason of false representation, because the representation was not material. And it was further urged that the case recognised nothing as affecting the validity of the policy that was not either warranty or representation. Now, it appears to me that the matter in which the question arises before us is not either matter of representation or matter of warranty in the strict sense in which the term "warranty" is used in our books. "Warranty" in that sense I take to mean an assertion as a part of a contract of the contractor or warrantor on a specified state of things. The clause of this proviso, on which the controversy turns, does not in form comprise such an assertion; it is a condition in the strictest sense of that word. It is the proper proviso of a condition to define the conduct or the event on which the contract shall be void. In the present instance, if the condition define wilful falsehood in the dealings of the assured for the policy, or that conduct upon the commission of which the policy shall be void, it appears to me that, upon the commission of the conduct, whether the falsehood be conveyed in writing or by spoken words, the condition is broken, and the contract is at an end, save for the purposes of forfeiting the premiums. And I think so to hold cannot in any degree affect the principles or distinctions which have been long and well established in reference to warranty and representation in policies of insurance.

But in a more extended sense the condition may be well considered as so far warranty, that it is a part of the written contract by which, though in a form of a condition the policy stipulates in effect that sincerity and good faith shall be maintained by the assured in his whole dealing for the policy; and such a contract amounts in effect to an express assertion or undertaking, warranting that all that the assured shall tell or write in that dealing shall be at least in his behalf true. I know no rule of law which disables the parties from so contracting. And thus the question to be determined is still this, whether, upon the true construction of the proviso, any wilful falsehood of the assured in his dealing with the Company for the policy shall annul the contract? Holding, for

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MONAHAN, C. J.

What we are called on to decide in the present case is, whether the judgment of the Court of Exchequer; overruling several exceptions which were taken at the trial to the charge of my Brother BALL, be correct? The question intended to be raised by the several exceptions is substantially the same; and as it appears to me to be clearly and distinctly put by the third exception, by which it appears that, on the conclusion of the evidence on both sides, Counsel for the Insurance Company required the learned Judge to direct the jury, that if they believed that before Patrick Fitzgerald signed the proposal of the 17th of June 1846, his life had been refused to be insured at the office of other Insurance Companies, or proposals made by him for that purpose, and that the answer given by him in said proposal, in reply to the question whether his life had been accepted or refused at any other office? namely, "No," was a false statement made by the said Patrick Fitzgerald to the said Insurance Company in or about the obtaining of the said insurance, then that they should find a verdict for the defendant on the plea of the general issue, although they should believe that such false statement was not material to the said insurance; which direction the learned Judge refused to give, but told the jury to consider whether they believed the statement that the life of the said Patrick Fitzgerald had not been previously to the said proposal refused to be insured at the office of other Companies to be false, and if false, whether they believed such false statement to be material to said insurance; and if they believed same to be both false and material, they should find a verdict for the defendant.

It will be observed that the question was left to the jury as to whether the statement in question was made in or about the obtain-

ing the insurance. All parties assumed that it was so made, and acting on this assumption, the Judge left to the jury not merely the question whether the statement so made in or about the effecting the insurance was false? but also the further question, whether such false statement was material to the said insurance? To the latter question it is that the Company object, and the real question in dispute between the parties is, was the Judge right in deciding that, according to the true construction of the contract between the parties, a statement made in or about the obtaining of the policy must be not only false, but also material to the insurance in order to vitiate the policy?

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It may not be irrelevant to ascertain whether any issue is raised on the question by the pleadings. It will be found that the first and second counts of the declaration set forth the policy at length, including the proviso or clause on which the question arises, and having done so, each count contains a distinct averment that there was not any false statement made to the Company in or about the effecting said policy. I am quite aware that if a declaration contain an unnecessary averment which might be altogether omitted, such averment need not be proved; but it may not be quite clear that such rule would apply to a case in which the averment could not be omitted altogether, but was made with greater particularity than was necessary. I do not, however, consider it necessary farther to consider this part of the case, as I am desirous to found my judgment, not on any mere technical rule of pleading, but on the true construction of the contract which was entered into between the parties.

It was in the first instance contended by the Counsel for the Company that the proposal of the 17th of June constituted a part of the contract, and that the agreement between the parties was to be found not merely in the policy, but in the proposal and policy; and as the proposal contains the question, the subject of the third exception, and the answer, which is alleged to have been false, and also contains the following stipulation—"I hereby agree that the particulars mentioned in the above proposal, and which may be stated by the referee above or hereunder mentioned, as the case

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"may be, shall form the basis of the contract between the assured
"and the Company;" and if there be any fraudulent concealment or
untrue allegation contained therein, or any circumstance material to
this insurance shall not have been fully communicated to the Com-
pany, or there shall be any fraud or mis-statement, all money which
shall have been paid on account of the insurance shall become
forfeited and the policy void; it was therefore argued that, accord-
ing to the express terms of the contract, the policy was void if the
statement in question was false. From this argument I altogether
dissent. The proposal, having been signed by Patrick Fitzgerald,
undoubtedly establishes that during the negotiation he agreed that
the particulars therein contained should form the basis of the contract
he was about to enter into with the Company, and if the agreement
were to be specifically executed in pursuance of such proposal, the
policy should no doubt contain a similar stipulation. But it is
perfectly clear that until the contract was actually completed by the
execution of the policy, it was competent for the parties to make
such alteration in its terms as they should mutually agree on; and, as
the proposal was not in any way accepted by the Company, until the
execution of the policy it was competent for either party to require
any variation of the proposal they might think fit; and if such
variation were not acceded to by the other party, the contract might
be altogether broken off. And I take it to be perfectly clear that if
after any proposal or negotiation the parties enter into a formal
written contract complete in itself, not referring to the proposal, the
parties are bound by such contract, and that the same cannot be in
any way modified or varied by the terms of such antecedent proposal.
In the present case the proposal is simply one for an insurance on the
party's life, the term of the whole life without participation of profits,
the premium to be paid yearly. The policy varies altogether from
this in several material particulars. It is not to extend to death on
the high seas, by duelling, by the party's own hands, or by the hands
of justice; and it also becomes void if the party shall go beyond the
limits of Europe, or enter into any military or naval service. The
policy does not at all refer to the proposal. I am therefore clearly
of opinion that the proposal in question forms no part of the actual

contract, and therefore that the terms of the contract must be found in the policy itself; the several parts of which it will therefore be necessary to consider with some little care. The policy, after reciting that Patrick Fitzgerald is desirous of making an insurance with the Company on his own life, and that he hath warranted and doth warrant that his name, residence, business or occupation is as above stated, that he is not employed in the naval or military service, that he has had the small pox, that he has not been nor is subject to certain diseases, that he is not affected with certain other diseases, or any disease tending to shorten life. It then witnesses that in consideration of the premiums paid and to be paid, the funds of the Company shall be liable to pay the sum insured on the death of the party. If the policy had stopped here, the legal effect of it would be clear enough, if any matter so warranted turned out to be untrue, no matter how immaterial the untruth might be, and though the death were caused by accident, or other causes wholly unconnected with the matter warranted, still the policy would be void, and the assured or his representatives would have been entitled to recover back the premiums paid, as so much money paid on a consideration which altogether failed.

The distinction between warranty and representation in insurance cases I hold to be this:—That no matter what the form of words used is, every statement or assertion of fact made by the assured in the policy, whether in the body, margin, back or other part of it, or in any document referred to by it, is warranty, and its falsehood vitiates the policy; but if the statement, though made contemporaneously with or antecedent to the effecting of the policy, is not in any way referred to by the policy itself, it is no part of the contract, it is mere representation, and unless material so as to be in some sense fraudulent, it will not vitiate the policy. The distinction between warranty and representation is distinctly and clearly stated in the case in the note to 1 *Doug.* p. 11. The policy then contains a proviso which in many very material particulars alters the effect of what preceded it; it provides that the policy shall not extend to several cases of death, and it completely alters the effect of what had been previously warranted, by providing that, if any thing so

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warranted shall not be true, all premiums paid on foot of the policy should be forfeited—a proviso which, though very hard on the assured, is perfectly legal, as settled by the case of *Duckett v. Williams* (a).

The proviso then proceeds:—"Or if any circumstance material to this insurance shall not have been truly stated, or shall have been misrepresented or concealed, or shall not have been fully and fairly disclosed and communicated to the said Company; or if any fraud shall have been practised upon said Company, or any false statement made to them in or about the obtaining or effecting of this insurance, the policy shall be null and void, and all monies paid by or on behalf of the said Patrick Fitzgerald on account thereof shall have been forfeited." It occurs to me that the first part of this proviso was intended principally to apply to circumstances in relation to which no express inquiry had been made; and therefore to render the clause at all sensible or intelligible, it was necessary to confine it to circumstances material to the insurance, as if you read the sentence omitting the word "material," it will be altogether unintelligible.

Then comes the branch, "if any fraud shall have been practised upon said Company." It is difficult to see how any particular fact or circumstance could be a breach of the previous part of the clause that would not also be a breach of the latter clause; still it is, I conceive, quite clear that if the defendant were to plead specially, it would be competent to plead in bar of the action certain facts or circumstances, and that they came within either branch of the proviso, that is, that they were circumstances material to the insurance not fully and fairly disclosed, or that they amounted to a fraud practised on the Company in or about the obtaining and effecting of the insurance. Then comes the part, "or any false statement made to the Company in or about the effecting or obtaining this insurance." It occurs to me that in construing an instrument of this description we should give to every clause its natural meaning, such as would occur to an unprofessional person, unless we are satisfied that so doing would violate the actual intention of the parties; so far from this

(a) 2 Cr. & M. 348.

being the case in the present instance, by adopting the argument of the Counsel for the Company, it occurs to me as clear that the clause was introduced into the policy expressly with a view of preventing any question being raised as to the materiality of any particular statement therein, which turned out to be false.

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It has been said it would be a very unreasonable contract for the party assured to enter into: my answer is, with that I have nothing to do; if parties will, without sufficient consideration or fully understanding, enter into hard or unreasonable contracts, they must blame themselves and not the law for carrying out such contracts. But I do not think the construction of the clause which appears to me to be the correct one would be attended with all the monstrous annoyances which have been suggested; as for instance, if a number of idle and immaterial questions were verbally asked by the agent of the Company previously to the execution of the policy, and that several of these questions were not contained in the formal printed questions, to which the agent required answers as the basis of the contract, I should not be surprised at a jury finding that the answers or statements made to such irrelevant verbal inquiries, though false, were not statements made in or about the effecting or obtaining the insurance; and therefore I am not at all disposed to deny that a jury, in considering whether a particular statement comes within the proviso, may take the materiality of it into consideration; but it does not occur to me that such consideration would properly apply to a written statement made under the circumstances that the proposal of the 17th of June was, and which at the time of signing, the party expressly agreed should form, the basis of the intended insurance: and here I must say that though I do not feel myself at liberty to refer to the proposal in order to construe the policy, still I am confirmed in the view I take as to the effect of the policy, when I find that if this construction be not adopted, several matters which the parties, at one time at least, intended should be the basis of the contract, and the falsehood of which should vitiate the contract, are in the actual agreement between them left altogether unprovided for.

Again, it has been objected that the effect of the construction of
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the proviso contended for will be to convert representation into warranty. I think not. The only difference which I conceive to exist between representation and warranty is this, that representation is a statement altogether *dehors* the policy, not contained in, or referred to by it. In the present case if the proviso had been, that, if any false statements had been made in the proposal of the 17th of June, the policy should be void, I do not think it has been denied that the present case would have fallen clearly within the contract of the parties, and that the jury would have nothing to do with the materiality of the statement; and if parties are at liberty by words of reference of that description to make what would be otherwise harmless representation at least of the same effect as warranty, I am not aware of any principle to prevent the parties using more general words of reference so as to embrace all statements made in or about the obtaining or effecting of the insurance. And considering the peculiar nature of life insurance, which it is not, in any case, obligatory on the Company to accept, and in which the party assured knows every thing, and the Company nothing, and in which the greatest possible good faith is required from the party assured to the Company, I do not think it unreasonable that the Company should require and the party assured agree that, if he had deliberately made a false statement for the purpose of obtaining the policy, the same should be void.

On the whole, therefore, my opinion is, that the question which ought to have been left to the jury was, whether the statement in question was a false statement, made in or about the effecting of the policy? and that they should not have been directed to find for the plaintiff unless they considered the statement in question material to the insurance, and therefore that the third exception and some others should have been allowed. I need scarcely say that, differing as I do from so many of my Brethren of much greater experience than myself, I feel considerable doubt as to the propriety of the conclusion to which I have come; still, after considering the matter with all the attention in my power, I cannot see any sufficient grounds for departing from the literal construction of the words actually used by the parties, and therefore I have been unable to agree in the conclusion arrived at by the majority of the Court.

BLACKBURNE, C. J.

I am of opinion that the judgment of the Court of Exchequer should be affirmed. The matter of defence which is involved in the consideration of the exception is, that the contract was proved to have been avoided *ab initio*, because the assured made a false statement "in and about the obtaining and effecting of the policy" and of the declaration. These are the words of that instrument, and it is on their construction, as used in both, that we are to decide; to construe them, we must inquire what is the nature and character of the false assertion which is to have the effect of vitiating the contract, and forfeiting the premiums paid by the assured.

The plaintiff in error contends that it is sufficient to ascertain, simply in the terms of the policy, that the false statement was made in or about obtaining it; and that when this is done, the words of the condition are so comprehensive and stringent, that the question is solved and the policy avoided, whether the statement was material or immaterial; in other words, that we are to read the clause as if it had contained these very words. I admit if this be the meaning of the words, if this be so clearly expressed as not to admit of any other rational construction, we must give them the operation contended for; but is this so? It is obvious, that to maintain a defence founded on this provision of the policy, proof must be made—first, of the false statement of some matter or fact; and secondly, that it occurred on the occasion of effecting the policy. The Judge and jury must inquire into both, and decide both. What could answer this inquiry, or be said in any propriety of language to come within such terms, but a mis-statement used by the assured to induce the Company to contract, and how could it have done so, if it were utterly immaterial? Amongst the variety of statements, verbal and written, that may occur in the course of such a treaty, some may appear so trivial that no weight or effect can be ascribed to them; others so substantial as to make it highly probable that they influenced the decision of the Company, while there may be a third class of so doubtful a character as to raise the question whether they did or could have had any such influence. How is a Judge to act? Is it his province to decide that, having *all* occurred in the dealing for

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the policy, and therefore in obtaining it, the policy is void? On the contrary, I think his duty is to supply some test whereby the jury may be able to decide whether any and which of them were the means used to procure the policy; and I can see no other test than that of materiality; to this I think we are forced to recur as the only rational mode of ascertaining the intention of the parties.

But there are other arguments in favour of the construction which I put on the words "in and about obtaining the policy." The policy transcribes a vast number of the articles of the assured's declaration, which was to be the basis of the contract, and it omits several of them, and amongst them those the subject of the exception; this seems to warrant the application of the maxim "*expressio unius est exclusio alterius*," and the consequence may fairly be said to be, that it was intended that the selected articles were to be warranted, and that those omitted were to retain their position as representations. In furtherance of this view it is also to be observed that the unlimited construction which is claimed for these words is open to this difficulty, that they will thereby include and provide for all the declarations of the assured which are warranted by the previous clauses of the instrument; for there can be no doubt that there are statements into whose materiality inquiry is precluded, and which are made in and about obtaining the policy; it would follow either that it was nugatory to have made them matters of express warranty where the same effect was given to them by these general words, or that the general words were to have their operation restricted by confining them to cases in which the contract was induced by the false statement of material facts. There is another consideration which has weighed very much with me; it is, that we are called on by the Company, whose language this instrument is, and who could have used terms free from ambiguity, to avoid their contract by reason of the false statement of an immaterial fact; this is scarcely rational, it is incredible that this could have been so understood or intended. It seems to me to be just as absurd as a condition that the contract should be void on the occurrence of some collateral and independent fact or event.

I would, however, advert to the position, that many of the exceptions assume that the false statements were in or about obtaining the policy, and that the learned Judge should therefore not have left it to the jury to inquire into their materiality, though if he had not made this assumption, and had left it to the jury to say whether the statements were or not so made, he might have informed them that in deciding that question they might consider whether these statements were material or not. I confess I cannot see any substantial, or as to the result, any practical difference between these modes of dealing with the question; in the one the jury is told that, though in terms the statements were made in or about effecting the policy, they are not, if immaterial, to be so considered in law; in the other, that if they considered the statements immaterial they should or might find that they were not made in or about obtaining the policy; there is no doubt a verbal distinction between the two modes of putting the question; but the question to be solved is the same in both, the same result will follow from the same fact in both modes of putting them; in both the subject of inquiry is the materiality of the false statement—a subject, in the consideration of which the exception and argument for the plaintiff in error insists, should be utterly and altogether excluded.

I have now stated the view I entertained of this case from an early period of its discussion. Amongst the exceptions, however, there was one (the ninth) that raised the question, whether the Judge should not have directed the jury that if they believed that proposals for insurance had been rejected by other Companies, and that two sisters of the assured had died of consumption, that these are *material facts*; and if not communicated to the Company, they should find for the defendant. The materiality of those facts is so obvious, and the proof of the falsehood of them denied by the assured so clear, that I was, on a reconsideration of the case, disposed to think that the ninth exception was well founded.

I have come to the conclusion that the Judge could not have so directed the jury, because there was a preliminary question to be decided by them, whether the answers of the assured to the questions of the Company were intended to be referred to by the proviso

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E. T. 1851. in the policy; and further, because in considering that preliminary
Esch. Cham. question, it was their exclusive province to ascertain that intention
by the test of the materiality of the falsified statements.
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In conclusion, with this topic as well as others that have undergone discussion, I may observe that giving to the document, which was to be the basis of the contract, its fullest effect, it would be by no means conclusive evidence that all the answers were to be deemed material. On the contrary, when the policy selects some and omits others, though the proposal is its basis, the final agreement is, that the former becomes matter of warranty, and the latter remain matters of representation.

I therefore agree with the majority of the Court, although with considerable doubts. The judgment, therefore, of the Court below must be affirmed.

Judgment affirmed.

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BENJAMIN L. LEFROY

v.

REVEREND THEOBALD WALSH,
 SIR JOHN MAXWELL TYLDEN AND GEORGE DOYLE.

(*Common Pleas.*)

May 9, 10.

REPLEVIN, for taking the plaintiff's cattle. The defendants pleaded six avowries and cognizances. By the first the defendants Walsh and Tylden avowed the taking as a distress in right of a tenancy under them in one Laurence Conrahy, at an annual rent of £77. 6s. 3d., with six pence in the pound receiver's fees, payable half-yearly, on the 25th of March and the 29th of September, with a penal rent of six pence for every pound of rent in arrear; and the defendant George Doyle made cognizance as their bailiff. The second avowry and cognizance were the same as the first, except that they were confined to the penal rent. The third avowry and cognizance justified under a tenancy in Anthony George Lefroy, in all respects the same as that stated in the first. The fourth avowry and cognizance justified under a tenancy in Anthony George Lefroy, similar to that stated in the other counts, and in all other respects resembled the second. The fifth avowry and cognizance justified under a tenancy in Thomas Ferris and John Keely, similar to that in the other counts, and in all other respects resembled the first; and the sixth avowry and cognizance justified under a tenancy in Thomas Ferris and John Keely, similar to that stated in the other counts, and in all other respects resembled the second. To all these avowries and cognizances the plaintiff pleaded in bar *riens in arrear* and *non-tenuit*, upon both of which issue was joined, and a special plea, which did not become material. The case was tried before Blackburne, C. J., at the Spring Assizes 1851, for the county of

Payment of an abated rent for a period of thirty years by a tenant holding under a lease for a term unexpired is, if unexplained, evidence to go to a jury of the surrender of such lease and the creation of a new tenancy at the abated rent; and the effect of such payment is not destroyed by the fact that during part of the time it has been made to a tenant for life with a strict power to lease.

Semble—A tenant for life, with power to lease for three lives or thirty-one years, at the best rent, may toties quoties accept surrenders of existing leases granted in execution of his power, and create new demises, pro-

vided that at the time of their execution they are in conformity with the terms of such power.

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Kildare, when it appeared that the distress was levied for the arrears of a rent of £77. 6s. 3d., reserved by a lease of the 31st of August 1816, made by Henry Lomax Walsh to Laurence Conrahy, of certain lands in the county of Kildare, for three lives or thirty-one years. H. L. Walsh was, at the time of making this lease, tenant for life of the lands comprised in it, with a power to lease for three lives or thirty-one years, at the best rent; and the Judge's report stated that no payment of the full rent reserved was proved to have been made since the year 1819, from which time an abated rent of £57. 10s. had been paid to the tenant for life until his death in 1831, and from that time until the month of March 1841 to the defendants Walsh and Tylden, who, upon the death of the tenant for life, became entitled to the reversion. At the close of the case the plaintiff's Counsel called upon the learned Judge to direct the jury that they were at liberty, from the fact of the receipt of the abated rent, to presume that the lease of 1819 had been surrendered, and a new tenancy created at the smaller rent, or that there had been a release of the difference between the rent reserved and the abated rent. This the learned Judge declined to do, and the jury accordingly, under his direction, found a verdict for the defendants on all the issues.

Macdonogh having on a former day obtained a conditional order to set aside the verdict on the ground of misdirection—

Berwick, with whom was *H. Smythe*, now showed cause.

The jury could not have presumed the existence of a deed releasing a part of the rent unless on proof of a continuous receipt of an abated rent for twenty years previous to the commencement of the present action by a person entitled in fee; and in the present case the tenant for life having died in the year 1831, there were no grounds for presuming a lost deed. Neither could they, from the circumstance of the defendant having received an abated rent, presume the surrender of the lease of 1819. The cases in which it has been decided that such a fact may be presumed are those in which the owner of a particular estate has been a party to some act, which he is by law afterwards estopped from disputing, and which would

not to be valid if his particular estate had continued: *Lyon v. Read* (a). Such is the case of a lessee for years accepting a new lease, which would not be valid without the surrender of the former; but the mere receipt of an abated rent is not a fact inconsistent with the existence of the former lease, as the rent may have been abated by the landlord from motives of consideration for his tenant.—[MONAHAN, C. J. Is not a tenant for life, with a leasing power, by virtue of his estate for life, enabled to accept a surrender of an existing lease, and grant a new lease *toties quoties*, provided he comply with the requisites of the power? but as in the present case there is no evidence of any new lease having been executed with the formalities required by the power, could not the tenant for life create by parol a tenancy from year to year, which would, after receipt of rent by the remainderman, be binding on him until determined by notice to quit, and might not the jury, from the receipt of an abated rent by the tenant for life and remainderman from 1819 to 1848, infer the surrender of the former lease, and the creation of a tenancy from year to year?—The acceptance of an abated rent, when it is proved that the plaintiff held under an existing lease, is no proof of a new letting. The act sufficient to create such a presumption must be an act done; mere payment is not sufficient.—[BALL, J. It is evidence of such an act having been done.—JACKSON, J. If receipt of rent be evidence of the existence of a tenancy, receipt of an abated rent must be some evidence of a new tenancy.]—In *Fitzgerald v. Lord Portarlington* (b), it was held that the Court would not from the receipt of an abated rent presume a contract for a surrender of a former lease.—[MONAHAN, C. J. In that case the document proved that the intention of the parties was that the old lease should be the subsisting contract. The Court could not in that case go on presumption at all; they had a legal contract which they were bound to interpret, and they accordingly interpreted it as amounting not to a surrender but an abatement.]—Where the lease is under seal there cannot be a presumption that it was surrendered by parol.

The following authorities were referred to :—*Eldridge v.*

(a) 13 M. W. 265.
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(b) 1 Jones, 431.
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Macdonogh (with whom was *J. T. Ball*), for the plaintiff.

The tenant for life was competent to have accepted a surrender, and granted a new lease, subject to the restrictions of the power: *Nixon v. Robinson* (d). The acts of the tenant for life are therefore to that extent of the same effect as those of an owner in fee. Secondly.—The question is, was there any evidence to be left to the jury of the surrender of the lease of 1816? And we contend that the fact of the receipt of an abated rent, coupled with the acquiescence of the remainderman when he came into possession, were circumstances material to be submitted to the jury on that question. It was a presumption of fact as distinguished from a presumption of law: *Walker v. Richardson* (e); 1 *Taylor on Evidence*, p. 133. The case of *Eldridge v. Knott* is distinguishable; in that case there was no mutual act favouring the presumption, and there was a final period of limitation within which no presumption could be made. The cases of *Rex v. Stephens* (f), *Read v. Brookman* (g), show that the Court will make every presumption consistent with the acts of the parties.—[MONAHAN, C. J. All those were cases in which circumstances were left to the jury to presume one state of facts; here there are two with which they are consistent.]—For that reason the fact should have been left to the jury to determine which of the two inferences was correct; if they could only draw one inference we would be entitled to a direction. In cases of rights of way where the user has been permissive, the Judges have, no doubt, not left the question to the jury; but the question here is, has the payment of the abated rent been permissive? There is no proof of the plaintiff being the assignee of the lease of 1816. If, as has been contended, the mere fact of the plaintiff being in possession of the same lands as those comprised in the lease is proof of his holding under

(a) Cowp. 214.

(c) 5 B. & Ald. 232.

(e) 2 M. & W. 882.

(b) 5 Taunt. 169.

(d) 2 Jo. & Lat. 4.

(f) 1 Burr. 434.

(g) T. R. 158.

that lease, the presumption of a surrender or release might be defeated by the production of any old lease.

The following authorities were cited :—*Campbell v. Wilson* (a) ; *Nepean v. Doe* (b) ; *Doe v. Hilder* (c) ; 2 *Saund.* p. 175, a.

Cur. ad. vult.

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MONAHAN, C. J., now delivered the judgment of the Court.

May 11.

In this case we are all of opinion that the verdict must be set aside. The lease under which defendants avow is dated the 31st of August 1816, and contains a demise for three lives or thirty-one years, reserving a rent of £77. 6s. 3d.; and the evidence at the trial went to show that for three years after the execution of this lease the full rent was received; but that from the year 1819 a smaller rent, amounting to £57. 10s. only, had been demanded and paid. There was no evidence produced to connect the present occupier with the original lessee, or that the lease of 1816 had been even acted on, or heard of from 1819 until it was produced at the trial. We therefore are of opinion that the facts unexplained of the payment of the lessee's rent of £57. 10s. for a period of thirty years, although during a portion of that time made to one who was tenant for life, was evidence which should have been submitted to the jury, and from which they might infer the surrender of the lease of 1816, and the creation of a tenancy from year to year by the tenant for life, which we are of opinion he had power to create. It may be that when the case is submitted to the jury they shall be of opinion that no surrender was in fact made or new tenancy created, but that a temporary abatement, not binding on the remainderman, had been made; but be this as it may, in our opinion the question should have been left to the jury, and therefore we must set aside the verdict.

(a) 3 *East*, 294.

(b) 2 *M. & W.* 894.

(c) 2 *Sug. V. & P.* 1140.

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UNIACKE v. KIRWAN.

May 10, 11, 12.

Replevin for taking the plaintiff's goods in the parish of M., in a certain close called T.; the defendant avowed the taking in the *locus in quo*, because the defendant held said close called T., in the parish of M., as his tenant, at a yearly rent, for the arrears of which he distrained. The plaintiff pleaded in bar that he did not hold the said close called T. in the parish of M., *modo et forma*. At the trial it appeared that the close in question was situated in the parish of C. *Held*, firstly, that the plaintiff was not estopped from showing that the lands of which he was tenant were situated in the parish of C; secondly, that the averment in the avowry of the parish in which the lands of T. so held were situated was material, and the variance fatal.

REPLEVIN, for taking the plaintiff's goods and chattels on the 12th of September 1850, in the *parish of Moylescar*, in the county of Galway, in a certain close there called Tristane.

Avowry, in the following form:—"And the said Patrick Kirwan, by, &c., comes and defends the wrong and injury, when and soforth, "and well avows the taking of the said goods and chattels in the "said declaration mentioned, *in the said close, in which and soforth*, "and justly and soforth, because he says that the said J. F. Uniacke, "for a long time, to wit, for the space of twelve months next before "and ending on a certain day, to wit on the 1st of May A. D. 1850, "and from thence until and at the said time when and soforth, held "and enjoyed the *said close called Tristane, in the parish of Moylescar, and county of Galway aforesaid*, in which and soforth, with "the appurtenances, as tenant thereof, to the said Patrick Kirwan, "by virtue of a certain proposal for a lease thereof theretofore made, "at and under a certain yearly rent, to wit the yearly rent of £470, "payable half-yearly, on the 1st day of May and the 1st day of "November in every year, by even and equal portions; and because "the sum of £470 of the rent aforesaid for the space of twelve "months, ending as aforesaid on the said 1st of May, in the year "aforesaid, and from thence until and at the said time when and "soforth, was due and in arrear from the said J. F. Uniacke to the "said P. Kirwan, he the said P. Kirwan well avows the taking of "the said goods and chattels in the said close, in which and soforth, "and justly and soforth, as for and in the name of a distress for the "said rent so due and in arrear as aforesaid, and which said rent "still remains due and unpaid; and this the said Patrick Kirwan is "ready to verify, wherefore he prays judgment and a return of the "said goods," &c.

Plea in bar—That the defendant ought not to avow the taking of

the said goods and chattels *in the said close, in which and soforth*, because he saith that the said plaintiff did not hold or enjoy the said close called Tristane *in the said parish of Moylescar*, and county of Galway aforesaid, in which and soforth, with the appurtenances, as tenant to the said defendant by virtue of the said alleged proposal for a lease thereof in the said avowry mentioned *modo et forma*.

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The case was tried before MOORE, J., at the Spring Assizes 1851, for the county of Galway, when the defendant proved that the plaintiff was his tenant of the lands of Tristane under a written proposal at a rent of £470. He then produced a witness to prove the value of the distress, who, on cross-examination, stated that he lived on the lands of Tristane; that he had made a distress on them, and that they were situated in the parish of Clontouskert, in the county of Galway.

The defendant's evidence having closed, the plaintiff's Counsel called upon the learned Judge to direct a verdict for him, on the ground that the evidence proved a taking in the lands of Tristane, in the parish of Clontouskert, for rent due out of those lands, whereas the taking complained of was in the parish of Moylescar, and the avowry was for rent due out of the last-mentioned lands. The learned Judge declined to do this, and directed a verdict for the defendant, reserving liberty to the plaintiff to change it into a verdict for him for £5 in case the Court should consider the variance to be fatal, in which event he should be placed in the same position as if a verdict had been directed for him.

A rule having on a former day been obtained for this purpose—

Macdonogh, with whom was *P. Blake*, now showed cause.

The object of requiring the *locus in quo* to be minutely described in the declaration is for the benefit of the avowant, and to apprise him of the place in which the caption occurred on which the plaintiff intends to rely: *Ward v. Lavile* (a); and for this reason the same accuracy is not required in the avowry as in the declaration; and any defect in the description of the *locus in quo* will be cured by pleading over. We could not have avoided this variance, the

(a) Cro. Eliz. 896.

E. T. 1851. *Common Pleas.* plaintiff having himself in the declaration misdescribed the *locus in quo*. The plaintiff seeks to work a departure in evidence from his own declaration; but he is estopped from showing that the taking was elsewhere than he has by his declaration stated it to be. In *Nibley v. Smith* (a), the plaintiff having declared in replevin for taking goods and chattels, to wit a limekiln, of which the defendant avowed the taking as a distress for rent, a plea in bar to the effect that the limekiln was affixed to the freehold was held to be bad as a departure from the declaration. Here, in like manner, if the plaintiff by his plea in bar stated the taking to be in another parish, it would be a departure.—[BALL, J. The cases you cite are cases of departure in pleading.—JACKSON, J. Suppose part of the lands of Tristane to be situated in one parish, and part in another, and that the plaintiff was not tenant of the part of the lands in the latter parish in which the distress was made, it cannot be contended that the plaintiff, by having declared for a taking in the latter parish, had estopped himself from showing that he was not tenant of any lands in that parish, because he might lay the caption in any place where the cattle were driven after the distress was levied.—MONAHAN, C. J. Your evidence justifies a distress in the parish of Clontouskert and nowhere else, and on the record you justify a distress in another parish.]—The averment of the parish in which the lands are situate was immaterial, and not traversable. The cases in which such an averment has been held necessary are those in which the plaintiff's right to distrain depends upon the lands being situate in a particular parish, as in the case of a distress for tithes: *M'Swiney v. Longfield* (b); *Kennedy v. Read* (c). There was no proof of there being another parish of the same name.

Fitzgibbon, with whom were *J. S. Townsend* and *Duggan*, in support of the rule.

The defendant having joined issue on the plea of *non tenuit*, was bound to prove affirmatively that the plaintiff held from him a close

(a) 4 T. R. 504.

(b) 2 H. & B. 194.

(c) Glasc. Rep. 77.

called Tristane, in the parish of Moylescar. The statement of the vill and place is a material and traversable averment: *Read v. Hawke* (a); *Ward v. Lakin* (b); *Bullythorpe v. Turner* (c); *Potten v. Bradley* (d). The defendant might either have pleaded *non cepit*, or *cepit in alio loco* generally, or he might have pleaded specially, that he took the goods in some other place, describing it, and traverse the place laid in the declaration, and then avow stating the cause; in which case he would be entitled to a return of the goods. Here by his avowry he seeks a return of the goods, which, on a plea of *non cepit*, or *cepit in alio loco* simply, he is not entitled to.—[MONAHAN, C. J. You should have confined your evidence to the question of the place which the defendant alleged you held, and not have given evidence as to the place where the distress was made, which was admitted on the pleadings.]

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Blake, in reply.

The question is one as to the identity of the lands held, and the defendant is not bound to show that the description of the place corresponds in every minute particular; as if the plaintiff by his declaration described the close by abutments, and the defendant avowed a taking in the *locus in quo*, a variance in proof of the boundaries would not be fatal if it appeared that the lands were identical: *Rex v. Glossop* (e).—[MONAHAN, C. J. It is necessary for you to show that you took the goods on the land which the plaintiff held as your tenant. It would be quite consistent with your avowry that the defendant took the cattle upon other lands and then drove them to the lands on which the distress was made.]—The point arising on the report is, that the taking was proved to have been in a different parish from that averred.—[BALL, J. We must take the avowry as containing two separate averments: one that the taking was in a certain close, situate in a particular parish; and secondly, that the plaintiff held those lands as tenant to the defendant. Now there was no proof required of the first of these

(a) Hob. 16.

(b) Sir F. Moore, 678.

(c) Willes, 475.

(d) 2 Moo. & Pay. 78.

(e) 4 B. & Ald. 619.

E. T. 1851. averments, because it was admitted on the pleadings. We must
Common Pleas. therefore conclude that the reservation of the Judge referred to the
 UNIACKE only fact in controversy, namely, the variance in the description of
 v. the premises which the plaintiff held.]—In order to maintain that
 KIRWAN. objection the plaintiff must admit the lands held and the lands upon
 which the seizure was made to be the same, and then he would be
 estopped from disputing that they were situated in the parish of
 Moylescar. The cases cited to show the materiality of the vill and
 place only apply to the place of taking, and not to the place stated
 in the avowry as the place out of which the rent accrued, or which
 the defendant held.

Cur. ad. vult.

May 12. The judgment of the Court was now delivered by—
 MONAHAN, C. J.

In this case we have conferred with the learned Judge before whom the case was tried, as to the manner in which he intended to reserve the question which was the subject of the present motion; and from his statement it appears that at the trial there was no controversy between the parties as to the place where the caption was in fact made. Both parties appear to have assumed that the taking of the goods was upon the lands of Tristane, which the evidence showed to be in the parish of Clontouskert; but the defendant's argument was, that inasmuch as in the declaration the lands of Tristane are stated to be situated in the parish of Moylescar, and as that fact was not traversed, the plaintiff was estopped from showing that they were situated in another parish. On the other hand, the plaintiff contended that as the defendant had avowed that he took the goods because the plaintiff held the lands of Tristane, in the parish of Moylescar, as his tenant, he was bound to prove that fact. We must, therefore, read the reservation of the learned Judge as if it related to a variance in the description of the lands held by the plaintiff as tenant to the defendant; and in that point of view we are all of opinion that we must consider the question as if there were two lands of the same name situated in different parishes, of one of which the plaintiff was tenant, and as if the defendant had

incautiously entered upon the one on which he had no right to distrain. It was not suggested at the trial that these are different names for the same parish; and we think that we must read this avowry as if it contained two distinct averments; first, that the taking was on the lands of Tristane, in the parish of Moylescar; and secondly, that the plaintiff held the lands, so situate in the parish of Moylescar, as tenant to the defendant. The first averment was admitted on the record, and the only question at the trial was, whether the defendant had sustained his allegation, that the plaintiff held lands in Moylescar as his tenant? This he did not do, as his evidence showed that the lands held by the plaintiff as his tenant were situate, not in the parish of Moylescar, but in the parish of Clontouskert; and though there was evidence at the trial to show that the distress was in part taken in the parish of Clontouskert, still on the record this evidence must be taken to have been received not to contradict the admission of both parties that the distress was made in the parish of Moylescar, but as a mode of proving what lands the plaintiff held as tenant to the defendant.

The cause shown must therefore be disallowed, and from the peculiar manner in which the point was reserved, with costs.

E. T. 1851.
Common Pleas.
 UNIACKE
 v.
 KIRWAN.

T. T. 1851.
Common Pleas.

May 29, 30.

MADDEN v. BRYAN.

June 12.

To a count in trespass for seizing, taking and distraining the plaintiff's goods and chattels, and impounding them, *per quod* they were damaged; the defendant pleaded that the plaintiff held a certain dwelling-house as his tenant, and that he took, seized and distrained the goods, &c., therein as a distress for rent. Plaintiff replied *de injuria*. *Held*, first, that the replication was bad as putting in issue the defendant's title to the dwelling-house. Secondly, that the plea was bad for not showing that the defendant had before making the distress complied with the requisites of the statute 9 & 10 Vic. c. 111, s. 10.

Semble.—An averment that the defendant distrained for rent in arrear does not put in issue the legality of the distress.

TRESPASS.—The declaration contained three counts. The first count was for seizing, taking and distraining the plaintiff's cattle and goods. The second count was for seizing, taking and distraining the said plaintiff's cattle and goods, and impounding them, *per quod* they were damaged. And the third was a count in trespass *de bonis asportatis*.

The defendant pleaded—first, not guilty, to the whole declaration.

Secondly, as to the seizing, taking and distraining the goods and chattels in the first count mentioned; *Actio non*, because he says that the said plaintiff for a long time, to wit for the space of half a year next before the 1st day of January, A.D. 1851, and from thence until and at the time when and soforth, held and enjoyed a certain dwelling-house, &c., situate to wit at, &c., as tenant thereof to the said defendant, under a certain demise thereof theretofore made at and under a certain yearly rent, to wit the rent of £280, payable half-yearly, to wit, that is to say on the 1st day of January and the 1st day of July in each and every year during the continuance of the said demise, by even and equal portions; and the said defendant says that on the said day and year last aforesaid, a large sum of money, to wit the sum of £91.0s. 1d. of the rent aforesaid, being the balance of half a year's rent of the term aforesaid, ending on the said day and year then last elapsed, became and was due and payable to the said defendant, and at the said time when and soforth, was then in arrear and unpaid, wherefore one John Connor, then and there being the known agent of and for the said defendant, then and there made a written warrant to distrain, signed by the said John Connor, directing one Patrick Blackbyrne, the bailiff of the said defendant, to distrain the said plaintiff named therein, and bearing upon it the date when and the name of the place at which it was signed as aforesaid, and which

said warrant was signed within twenty-one days, to wit twenty days before the time when the distress, next hereinafter particularly mentioned, was so made, as is hereinafter mentioned, to wit at, &c.; whereupon the said P. Blackbyrne, as such bailiff as aforesaid, on the day and year when and soforth, entered into the said dwelling-house, in which the said goods and chattels in the said first count of the said declaration mentioned were then and there standing, lying and being, for the purpose and in order to seize, take and distrain, and did then and there seize, take and distrain the said goods and chattels in the said first count of the said declaration, in the said dwelling-house and premises then being as aforesaid, and took and seized* the same as and for a distress for the said rent so due and in arrear as aforesaid, in the most fit and convenient part thereof for that purpose, according to the form of the statute in such case made and provided; and at the said time of making the said distress the said Patrick Blackbyrne did then and there *deliver* to the said plaintiff a particular in writing of the rent then and there demanded, specifying the amount thereof, the time when the same accrued, and the name of the said defendant, he then and there being the person by whose authority the said distress was made, *pursuant to the provisions of the statute in such case made and provided*, to wit at, &c., *quæ sunt eadem*.

T. T. 1851.
Common Pleas.
MADDEN
v.
BRYAN.

Plea to the second count as to the seizing, taking and distraining the goods and chattels in the said count mentioned, and impounding the same, and keeping and detaining the same from the said plaintiff for a certain space of time, to wit, &c.; *Actio non*, because he says that the said plaintiff for a long time, to wit for the space of half a year next before the 1st of January 1851, and from thence until and at the time when and soforth, held and enjoyed a certain dwelling-house, &c., situate, to wit at, &c., as tenant thereof to the defendant under and by virtue of a certain demise thereof to him theretofore made at and under a certain yearly rent, to wit the rent of £280, payable half-yearly on the 1st day of January and the 1st day of July in every year during the continuance of the said demise, by even and equal portions; and the said defendant

* *Sic.*

T. T. 1851. *Common Pleas.*
MADDEN
 v.
BRYAN.

says that on the said day and year last aforesaid a large sum of money, to wit the sum of £91. 0s. 1d. of the rent aforesaid, for the balance of half a year's rent of the term aforesaid, ending on the said day and year, and then last elapsed, became and was due and payable to the said defendant, and at the said time when and soforth was then in arrear and unpaid, wherefore the said defendant, in his own right, on, &c., entered into the said dwelling-house in which the said goods and chattels in the said second count of the said declaration were then and there standing, lying and being, for the purpose and in order to take, seize and distrain, and did then and there take, seize and distrain the said goods and chattels in the said second count mentioned, in the said dwelling-house and premises then being as aforesaid, and took and seized the same thereon as and for a distress for the said rent so due and in arrear as aforesaid, and took and seized* the same as such distress as aforesaid thereon in the most fit and convenient part thereof for that purpose, according to the form of the statute, &c., *quæ sunt eadem.*

The special plea to the third count was similar to the special plea to the first.

Replication of *similiter* to the plea of the general issue, and *de injuriâ* to the several other pleas.

Demurrer to the replication to the second, third and fourth pleas, on the ground that they put in issue several distinct matters, and that they were pleaded as if the defendant's pleas consisted wholly of matter of excuse, and did not claim for the defendant an interest in the dwelling-house. The points marked on behalf of the plaintiff were, that the pleas all amounted to the general issue; that the second plea to the first count, and the plea to the third count, did not admit that John Connor therein named made the warrant of distress, or that P. Blackbyrne made the distress by the authority of the defendant, and that it did not state that the particular of distress stated the name of John Connor, and that the acts of S. Connor and P. Blackbyrne stated in these pleas were not stated to have been done by the command of the defendant; and that the third plea did

* *Sic.*

not state that at the time of making the distress a notice had been served pursuant to the statute.

T. T. 1851.
Common Pleas.

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v.

BRYAN.

H. Hamilton, in support of the demurrer.

The replication is confessedly bad, and the only question which can arise is, whether the pleas are sufficient? With regard to the second special plea, it would have been a good plea before the statute 9 & 10 Vic. c. 111; and that statute cannot alter the form of pleading what is a Common Law right, according to the rule laid down in *Stephens on Pleading*, 4th ed. p. 402:—"With respect to acts valid at Common Law, but regulated as to the mode of performance by statute, it is sufficient to use such certainty of allegation as was sufficient before the statute." The converse of this position is illustrated by the mode of pleading a devise of land, which could not be made at Common Law, and in pleading which, therefore, it must be stated to have been made in writing. The averment that the defendant distrained must be taken to mean that he legally distrained, and on an issue joined in that averment we would be bound to prove in *evidence* the service of the requisite notice. The 14th section of 9 & 10 Vic. c. 111* exempts the landlord from the consequences of any illegal act in making the distress.—[MONAHAN, C. J. That section applies only to an act subsequent to the distress, and not to a contemporaneous act like the present.]—In actions against Magistrates, where certain formalities are rendered necessary by statute before the action can be brought, it has been always held that those are matters of evidence and not of pleading. The same rule applies in actions by attorneys for costs, which must be served a month before the *action can be brought*. With regard to the special pleas to the first and second counts, they each contain an averment that a particular of the rent was delivered pursuant to the statute.—[BALL, J. The averment

* Which enacts, "that where any distress shall be made for any rent justly due, and any irregularity or unlawful act shall be afterwards done by the party distraining or by his agents, the distress shall not be therefore deemed to be unlawful, nor the party a trespasser *ab initio*; but the party aggrieved shall receive full satisfaction for the special damage sustained thereby, and no more, in an action of trespass or on the case."

T. T. 1851. is only that a particular was *delivered* pursuant to the statute, and
Common Pleas. not that the particular so delivered contained the requisites pre-
 MADDEN scribed by the statute.]
 v.

BRYAN.

The following authorities were referred to:—*Forth v. Staunton* (a); *Lucas v. Nockells* (b); *Greene v. James* (c); *2 Furlong's Land. & Ten.* p. 497.

H. Smythe, contra, cited *Taylor v. Cole* (d); *Galloway v. Jackson* (e).

Cur. ad. vult.

June 12.

MONAHAN, C. J., now delivered the judgment of the Court.*

This is an action of trespass, containing three counts. The first is for seizing, taking and distraining certain goods, the property of the plaintiff, and carrying away same, and converting the same to his own use.

The second is for seizing, taking, distraining and impounding and keeping for fifteen days certain other property of the plaintiff.

The third count is for seizing, taking, driving and carrying away certain property of plaintiff, not stating a distraining.

To each of these counts the defendant, in addition to the plea of the general issue, has pleaded a special plea of justification, in substance stating that plaintiff was his tenant of the premises on which the distress was made, and that the distress was made for rent in arrear. To this plea the plaintiff replied *de injuriâ*, namely, that defendant of his own wrong, without the cause alleged, committed the trespass complained of. To this replication a demurrer has been filed by the plaintiff, and plaintiff's Counsel admitted the replication could not be sustained, it being clearly settled that such a replication is bad to a plea justifying a distress for rent, though it is a good repli-

(a) 1 Saund. 210.

(b) 10 Bing. 157; S. C. 3 M. & Sc. 627; S. C. 1 Cl. & F. 438.

(c) 6 M. & W. 656.

(d) 3 T. R. 292.

(e) 3 Scott, N. R. 753.

* TORRENS, J., *absente*.

cation to a plea of a distress for a heriot: *Price v. Woodhouse* (a). *Hooker v. Nye* (b) decides it is a bad replication in case of a distress for rent.

T. T. 1851.
Common Pleas.
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v.
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The question then arises, are the pleas good on general demurrer? Several objections were made to the form of the several pleas; but the only one we thought required consideration was, whether a plea of a distress taken for rent in arrear should allege that at the time of the making the distress, the landlord or bailiff gave the notice required by the 10th section of the 9 & 10 Vic. c. 111?*. Two of the pleas do contain an allegation that a notice was given; but it is not alleged that the notice was such a one as required by the statute; and the notice, so far as the same is set forth, is not sufficient, as not containing the name and address of the bailiff by whom the distress was made. It was scarcely contended that the notice as set forth was sufficient, or that the absence of the notice did not render the distress illegal, and the party distraining a trespasser. But it was argued by Mr. *Hamilton* that the recent Act of Parliament did not render any change necessary in the form of the landlord's Common Law plea, and that the plaintiff should raise the objection either by replying the want of notice, or traversing the allegation that the distress was made for rent, and that on such traverse the defendant would be bound to show that he had served the regular notice, this being necessary to render his distress legal; and in support of this view he endeavours to bring the present case within the well known rule of pleading, which is laid down by Mr. *Stephens* in these words:—"With respect to acts valid at Common Law, but

(a) 16 M. & W. 1.

(b) 1 C. M. & B. 258.

* Which enacts, "that in all cases of distress for rent cognizable in any Court, whether superior or inferior, the person making any such distress shall, at the time of making such distress, deliver to the person in possession of the premises for the rent of which such distress shall be made, or in case there shall not be any person found in possession, shall affix on some conspicuous part of such premises a particular in writing of the rent demanded, specifying the amount thereof, the time or times when the same accrued, and the name and place of abode of the person by whom, and (if the person who acts in the making of the distress be not the party claiming to be entitled to the rent for which the distress is made) the name of the person by whose authority the distress is made, or otherwise such distress shall be unlawful and void."

T. T. 1851. "regulated as to the mode of performance by statute, it is sufficient
Common Pleas. "to use such certainty of allegation as was sufficient before the sta-
 , MADDEN "tute."

v.
 BRYAN.

The case of *Birch v. Bellamy* (a), and an *Anonymous case* (b), probably the same case, are generally referred to as establishing the doctrine; but the instances put are cases of demises, assignments or promises under the Statute of Frauds; as, before the statute, a demise for any number of years might be without writing, it was of course sufficient in a declaration to state that the plaintiff demised or assigned; and since the statute the form of pleading has remained the same. But with respect to all these cases it will be observed that when the plaintiff alleges that he or any other party demised or assigned certain lands, if that allegation is traversed, there can be no doubt that the plaintiff must, in support of it, prove a demise or assignment as required by the statute, as otherwise there could have been no demise or assignment; and therefore I can well understand why in such cases no alteration was necessary in the form of pleading. But in the present case I do not see how the service of the notice is implied in the statement that the defendant distrained or seized the goods as and for a distress for rent due and in arrear. It is no part of the distress; though required to be given at the time of making the distress, it is no part of the distress itself, but a collateral matter, required to be done at the same time; and therefore I cannot consider the service of the notice as included in the statement of the making or taking of the distress. It may be suggested that when a party says he distrained, it must be taken that he means he legally distrained. I do not think the word "distrained" has any such legal meaning. In the present case the declaration in the two first counts alleges that the defendant distrained plaintiff's goods; it cannot be pretended that the construction of the declaration is, that the defendant legally distrained. All the precedents of declarations in trespass for illegal distresses state that the defendant distrained; clear proof, as it occurs to us, that the word "distrain" does not necessarily mean a legal distress.

(a) 12 Mod. 540.

(b) Salk. 519.

Independently of this, it is laid down in *Case v. Barber* (a) that, though the rule in question applies to declarations, it does not apply to a plea which, in many instances, requires more certainty than a declaration.

T. T. 1851.
Common Pleas.
MADDEN
v.
BRYAN.

Upon the whole, therefore, we are of opinion that the pleas in question are bad, and therefore that the demurrer to the replication must be overruled, and judgment given for the plaintiff. As the defendant has on the record a plea of the general issue to the entire declaration, on which any defence he may have will be available, it is not a case for liberty to amend.

(a) Sir T. Raym. 450.

THE ECCLESIASTICAL COMMISSIONERS

v.

O'RYAN.

May 27.

J. F. MARTLEY moved for liberty to dispense with the affidavit required by the 252nd General Order of the 23rd of December 1850.

Where an ejectment for non-payment of rent is brought by a Corporation pursuant to a resolution passed at a meeting of the body, any member who attended at such meeting is competent to make the affidavit required by the 252nd General Order.

This was an ejectment for non-payment of rent; and the affidavit of the plaintiffs' attorney stated that he was employed by the plaintiffs, who were a corporate body, pursuant to a resolution passed at one of the meetings of the Board, and that he believed that there was no person by whom he was employed competent to make the affidavit required by the above order. It appeared that the attorney for the Ecclesiastical Commissioners was in the habit of attending the meetings of the Board, and that he instituted the present proceedings pursuant to resolutions passed at one of these meetings.

Counsel submitted that the act of a Corporation is the act of the body collectively, and that no act done by one member could bind the body.—[MONAHAN, C. J. The rule does not require the affidavit

T. T. 1851. of the plaintiff. If the land-agent was the person who gave the
Common Pleas. instructions, or the Secretary, either of these persons would, I con-
 ECCLESIAS- ceive, under the terms of the order, be competent to make the
 TICAL COM- affidavit.]—Here the order was not given by either of those persons,
 MISSIONERS but by a resolution of the body corporate. The Court can, under
 v. the 4th Supplemental Order of the 15th of January 1851, make
 O'RYAN. such order as may be right in special cases. That rule seems to
 have been framed with a view to a case like the present.—[MONA-
 HAN, C. J. That rule was made to provide for a case where the
 plaintiff and agent were the same person, or where the plaintiff was
 resident abroad and had given instructions to his agent by letter.]—
 The order has been already made in two cases in the Exchequer.

MONAHAN, C. J.

As this is a case of some importance we will, before deciding it,
 consult the Court of Exchequer on the subject.

Cur. ad. vult.

MONAHAN, C. J.

May 28.

In this case we are all of opinion that where the order for com-
 mencing proceedings has been given by the managing Committee of
 a public body, it is competent for any one of the persons composing
 that Committee to make the affidavit required by the 252nd General
 Order.

No rule.

T. T. 1851.
Common Pleas.

CLEARY v. FLEMING.

May 28.

JONATHAN W. SHERLOCK applied for liberty to vary the form of notice directed by the 1 G. 4, c. 87, to be subscribed at foot of the declaration in ejectment in proceedings against over-holding tenants. The statute requires a notice to be subscribed to the declaration in ejectment addressed to the tenant, and requiring him to appear on the first day of the Term next following. The 13 Vic. c. 18, s. 15, has substituted the writ of summons for the declaration in ejectment; and section 10 directs that the mode of appearance shall be the same as in other actions. The defendant is therefore bound to appear within eight days, and the notice required by 1 G. 4, c. 87, cannot be complied with.—[MONAHAN, C. J. This Court has not jurisdiction to give leave to vary a notice where the form is given by the statute. The statute enables you to obtain security for costs from the tenant who takes defence; but he is entitled under the terms of the Act to the interval between this and next Term to provide it. We cannot abridge that right.]—Under the 25th section the Judges have power to revise the practice and pleading of the Courts.—[MONAHAN, C. J. Perhaps the Judges under that statute may have power to make a rule varying the *form* of notice; but this Court solely has not that power.—BALL, J. As the question is one of importance, your best course will be to frame a notice and serve it with the writ of summons, and the Court will, on the motion for a rule to show cause, decide on its sufficiency.]

This Court has no jurisdiction to vary the form of notice required by the 1 G. 4, c. 87, to be annexed to the declaration in ejectment against over-holding tenants, so as to suit the practice as regulated by 13 Vic. c. 18.

No rule.

T. T. 1851.

Common Pleas.

M'MANUS v. M'ENROE.

June 3, 12.

A plea of justification to a declaration in slander must justify the words alleged to have been spoken in the sense attributed to them by the plaintiff's innuendos.

ACTION on the case, for slander.—The declaration contained four counts.

The first count, after a prefatory averment of the plaintiff's good character, stated that the plaintiff, before the time, &c., to wit, on &c., was duly appointed by the Guardians of the Poor of the Oldcastle Union to be one of the relieving-officers for the electoral division of Castleraghan, within the said Union, and it

thereby became and was the duty of the plaintiff, as such relieving-officer, spoke and published of and concerning the plaintiff, and of and concerning the plaintiff in the exercise of his said office of relieving-officer, these false, &c., words, "You" (meaning the plaintiff) "robbed the parish of C.," (thereby meaning that the plaintiff, whilst he was such relieving-officer, wilfully and corruptly, and in violation of his duty as such relieving-officer, caused persons to receive relief out of the rates levied for the relief of the poor off the parish of C. within the said Union, who were not proper subjects for or entitled to relief).

The second count, with a similar statement of the subject of the discourse and of the words alleged to have been spoken, set out the slander as follows:—"You" (meaning the plaintiff) "are a common robber." "You" (meaning the plaintiff) "robbed the parish" (meaning the parish of C., thereby meaning that the said plaintiff, whilst he was such relieving-officer, and in exercise of his office as such relieving-officer, wilfully, knowingly and corruptly, and in violation of his duty as such relieving-officer, caused and enabled persons to receive relief out of the property of the said Union who were not proper subjects to receive such relief, and thereby caused a larger rate for the relief of the poor to be levied off the said parish than otherwise would have been).

The third count was in the same words as that in the first, and the innuendo the same as in the second, except that for the words "caused and enabled persons to receive relief out of the property of the said Union" were substituted the words "gave relief to persons out of the fund of the said Union."

The defendant pleaded separately to each of the above counts that the plaintiff, whilst he was employed as such relieving-officer, received fifty bags of meal of the goods and chattels of the Guardians of the Poor of the said Union, and wilfully misapplied them, *contra formam statuti*.

Held, that the pleas were bad for not justifying the words alleged in the sense attributed to them by the innuendos in the declaration.

Held also, that the above counts of the declaration were bad for not averring that the parish of C. was comprised in the electoral division of C., and that the statement in the innuendo to the first count, that the parish of C. was within the said Union of O., could not be considered as an independent averment of that fact so as to sustain that count of the declaration.

Semble—On the argument of a demurrer to the defendant's pleas it is not necessary, to entitle the defendant's Counsel to argue objections of general demurrer to the declaration, that they should have been noted in the demurrer books.

ing-officer, not to give, cause or enable any persons to receive relief out of the rates levied for the relief of the poor in the said Union, to wit, in the county aforesaid; and though the plaintiff from thenceforth for a long space of time, to wit, for the space of two years then next following, continued to be and was such relieving-officer, and acted as such for the electoral division of Castleraghan within the said Union, and during all the time of his being such relieving-officer behaved and conducted himself and performed his duties as such relieving-officer honestly and faithfully, and never was guilty, or, until the time of the committing of the grievances by the said defendant as hereinafter mentioned, suspected of having being guilty of the offence or misconduct hereinafter stated to have been charged and imputed to him by the defendant, to wit, in the county aforesaid, nevertheless the defendant, well knowing, &c., but contriving to injure, &c., and to cause it to be suspected and believed that the plaintiff had been and was guilty of theft, and of wilful misconduct in his office as relieving-officer as aforesaid, heretofore, to wit, on the 30th day of November, A. D. 1850, at &c., in a certain discourse which the said defendant then and there had of and concerning the plaintiff, *and of and concerning the plaintiff in the exercise of his said office of relieving-officer*, in the presence and hearing of divers good and worthy subjects of our Lady the Queen, then and there in the presence and hearing of the said subjects falsely and maliciously spoke and published of and concerning the plaintiff, *and of and concerning the plaintiff* in the exercise of his office of relieving-officer, the false, scandalous, malicious and defamatory words following—that is to say, “You” (meaning the plaintiff) “robbed the parish of Castleraghan” (thereby then and there meaning that the said plaintiff, whilst he was such relieving-officer as aforesaid, wilfully and corruptly, and in violation of his duty as such relieving-officer, caused and enabled persons to receive relief out of the rates levied for the relief of the poor off the parish of Castleraghan within the said Union who were not proper subjects for or entitled to receive such relief).

T. T. 1851.
Common Pleas.
M'MANUS
&
M'ENROE.

The second count, after setting out the subject of the colloquium and the intention of the defendant in the same manner as in the first

T. T. 1851. count, stated the words as follows :—" You " (meaning the plaintiff)
Common Pleas. " are a common robber ; " " you " (meaning the plaintiff) " robbed the
 M'MANUS parish " (meaning the parish of Castleraghan, thereby then and
 v. there meaning that the plaintiff, whilst he was such relieving-officer
 M'ENROE. as aforesaid, and in the exercise of his office as such relieving-officer, wilfully, knowingly and corruptly, and in violation of his duty as such relieving-officer, caused and enabled persons to receive relief out of the *property* of the said Union who were not proper subjects for or entitled to receive such relief, and thereby caused a larger rate for the relief of the poor to be levied off the said parish than otherwise would have been levied).

The third count, with a similar averment as to the subject of the colloquium, stated the words as follows :—" You " (meaning the plaintiff) " robbed the parish of Castleraghan " (thereby then and there meaning that the plaintiff, whilst he was such relieving-officer as aforesaid, and in exercise of his said office of relieving-officer, wilfully, knowingly and corruptly, and in violation of his duty as such relieving-officer, gave relief to persons out of the fund of the said Union who were not proper subjects for or entitled to receive such relief, in consequence whereof a larger rate for the relief of the poor was levied off the said parish than otherwise would have been levied).

The fourth count did not become material.

The defendant pleaded—first, not guilty, to the whole declaration.

Second plea to the first count, *Actio non* ; because he says that the plaintiff, before the speaking and publishing of the several words of and concerning the said plaintiff, as in the said first count of the said declaration mentioned, to wit on, &c., at, &c., being then and there employed in the capacity of relieving-officer of the electoral division of Castleraghan in the Union of Oldcastle, in the said county of Cavan, by the Guardians of the Poor of the said Union, did by virtue of his said employment then and there, whilst he was so employed as aforesaid, receive and take into his possession, to wit fifty bags of meal, of the goods and chattels of the Guardians of the Poor of the said Union, to wit of great value, to wit of the value of £50, and the said goods and chattels did

then and there wilfully misapply, *contrary to the form of the statute* in such case made and provided; wherefore he the said defendant afterwards, to wit on the several times when and soforth, in the said first count of the said declaration mentioned, did speak and publish the said words of and concerning the said plaintiff, as in the said first count of the said declaration mentioned.—*Verification.*

T. T. 1851.
Common Pleas.
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The pleas of justification to the second and third counts were, with a few verbal differences, the same as that to the second count.

Demurrer to each of the pleas of justification, on the ground that they did not contain a sufficient justification of the speaking of the words alleged in the declaration; that they did not justify the words in the sense attributed to them by the innuendos; that they did not state in what manner the plaintiff had misapplied the goods and chattels therein mentioned, and that they attempted to put in issue irrelevant facts.

Joinder in demurrer.

The points noted on behalf of the plaintiff were the same as those assigned in the demurrer. No points were noted by the defendant.

J. C. Lowry, with whom was *J. Brooke*, for the plaintiff.

The duties of a relieving-officer are defined by 10 Vic. c. 31, ss. 7 and 25, and they consist of administering food, lodging, medicine and medical attendance; and misfeasance in the discharge of such duties is a Common Law offence: *Tawney's case* (a); 1 *Rus. on Crimes*, pp. 137, 138. The first plea justifies what is a statutable offence under the 1 & 2 Vic. c. 101, s. 101, and does not justify the slander stated in the declaration, which, as explained by the plaintiff's innuendos, imputes a Common Law offence. When a particular meaning is attributed to words by an innuendo the defendant, if he undertakes to justify them, must do so in the sense attributed to them by the innuendo; if the words do not bear that meaning, the defendant should plead the general issue; and at the trial the plaintiff will not be permitted to resort to another construction of the words; he must fail if the jury are not satisfied the words were spoken in the sense attributed to them by the innuendo: *Smith v.*

(a) 16 Vin. Abr. 416.

T. T. 1851. *Carey* (a); *Williams v. Stott* (b); *Black v. Holmes* (c). Here the colloquium stated in the declaration imputes general malversation by the plaintiff in the discharge of his duties as relieving-officer; and the pleas justify a particular act of misconduct. A plea of justification should show the particular acts of misconduct which supported the charge: *Janson v. Stuart* (d).

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Newton (with whom was *Coates*), for the defendant.

There is no statement in the declaration to show that the offence imputed is an offence at Common Law; the defendant might justify either the Common Law offence or the statutable offence, and he has selected the latter. He cannot be bound to justify every possible meaning which might be attributed to the words. The defendant is at liberty to show that he used the words in a different sense from that imputed to them by the innuendo, and justify them in that sense: *Lord Cornwall's case* (e); 7 *Bac. Ab.* by *Gwillim & Dodd*, tit. *Slander*, p. 312; *Com. Dig.* tit. *Pleader*, 2, L. 3. If the substantial fact he justified the innuendos are immaterial: *Astly v. Young* (f); *Edwards v. Bell* (g). The innuendo in the second count is, that the plaintiff, in violation of his duty as relieving-officer, enabled persons to receive relief out of the *property* of the Union who were not proper subjects. Our plea to this is therefore applicable. But secondly, the declaration is defective.

J. C. Lowry, for the plaintiff, submitted that no objections to the declaration having been noted for argument in the demurrer books, the Court would not entertain them.

Newton.

The 71st General Order does not require the defendant to furnish his objections to the declaration where the demurrer has been taken by the plaintiff.

(a) 3 Camp. 461.

(c) 1 Fox & Smith, 28.

(e) 4 Rep. 12, a.

(b) 1 C. & M. 675.

(d) 1 T. R. 748.

(f) 2 Bar. 887.

(g) 1 Bing. 403.

Per Curiam.—We do not think it was necessary for the plaintiff to note objections which are the grounds of general demurrer.

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Counsel for the defendant, in continuation.

The declaration does not state what the duties of relieving-officers are. An innuendo cannot extend the sense of the expressions beyond their natural meaning: *Barham v. Nethersall* (a); *Saund. Rep.*, p. 243, a. In the present case the declaration avers that the plaintiff was appointed relieving-officer of the electoral division of Castleraghan, and that he acted as such for the electoral division of Castleraghan within the Oldcastle Union; but there is no statement, except in the innuendo, that the parish of Castleraghan was within the Union or electoral division; and for the purposes of pleading it must be taken to be unconnected with the plaintiff's duties as relieving-officer. The plaintiff could not rob the parish in the sense attributed to the words by the innuendo, as there could not be a parochial rating. There should have been some ground laid by the colloquium for the meaning attributed to the words by the innuendo: *Rex v. Horne* (b); *Holt v. Scholesfield* (c); *Day v. Robinson* (d).—[MONAHAN, C. J. There is a statement that the words were used in relation to him as relieving-officer, and a previous averment that he was relieving-officer of the electoral division of Castleraghan; must it not be inferred that the parish was within the electoral division?]
That is not sufficient. In the case of *Craft v. Boite* (e) the words laid were—"he" (meaning the plaintiff) "hath stolen £200 worth of plate out of Wadham College" (meaning a college called Wadham College, in the University of Oxford), though the declaration contained no previous averment of Wadham College being connected with the University of Oxford; and Serjeant *Williams*, in his note, considers the innuendo wrong for that reason.

The following authorities were cited:—*Rex v. Griep* (f); *Cooke v. Ward* (g); 1 *Starkie on Slander*, p. 422.

(a) 4 Rep. 20, a.

(b) 2 Cowp. 683.

(c) 6 T. R. 691.

(d) 1 Ad. & El. 554.

(e) 1 Saund. 243.

(f) 1 Ld. Ray. 256; S. C. 2 Salk. 513; S. C. 12 Mod. 139.

(g) 4 M. & P. 99.

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Brooke, in reply, was desired to confine himself to the question whether the declaration was sufficient?

The fair construction of the declaration is, that parish was comprised within the electoral division, otherwise the slander would have no point. If the words had been, "you robbed me," and the innuendo, "meaning thereby that the plaintiff's misconduct had caused a larger rate to be levied off the defendant's lands," would that imply that there had been a separate rate struck for those lands? *Craft v. Boite* does not apply; in that case there was no statement in the innuendo that Wadham College was part of the University of Oxford: *Griffiths v. Lewis (a)*.

Cur. ad vult.

June 11.

MONAHAN, C. J., now delivered the judgment of the Court.

This is an action of slander. The declaration contains four counts; but the case comes before the Court on demurrer to special pleas of justification to the first three counts, the general issue alone having been pleaded to the fourth count. The words stated in the three counts on which the question arises are substantially the same, being in the first count, "you are a common robber; you robbed the parish of Castleraghan." In the second count, "you are a common robber; you robbed the parish." In the third count the same as in the first, namely, "you are a common robber; you robbed the parish of Castleraghan."

The declaration contains an introductory statement that the plaintiff was appointed by the Guardians of the Poor of the Oldcastle Union one of the relieving-officers of the said Union, and to act as such relieving-officer for the electoral division of Castleraghan within the said Union. It then states what the duty of the plaintiff as such relieving-officer was, and it then alleges that the words spoken of the plaintiff in the three several counts were spoken of him in the exercise of his office as relieving-officer; and having then stated the speaking of the words, the first count of the declaration contains the following innuendo, "meaning that the plaintiff, whilst relieving-officer, in the exercise of his office as such, caused and enabled

(a) 8 Q. B. 841.

"persons to receive relief out of the rates levied for the relief of the
 "poor of the said parish of Castleraghan within the said Union, who
 "were not proper subjects for or entitled to receive such relief."

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The second count contains an innuendo to the effect that the plaintiff caused persons to receive relief out of the property of the Union who were not proper subjects therefor, and thereby caused a larger rate to be levied off the said parish than otherwise would have been levied.

The innuendo in the third count is, that the plaintiff gave relief to persons out of the funds of the Union who were not proper subjects for or entitled to receive the same, in consequence whereof larger rates were levied off the said parish than otherwise would have been.

The special pleas which have been demurred to are substantially the same, and are in substance that the plaintiff received into his possession as relieving-officer fifty bags of meal, the goods of the Guardians of the Union, and wilfully misapplied the said goods, contrary to the form of the statute. In support of the demurrer which has been taken to these pleas, it has been argued that as the declaration explained by the innuendo contains only a charge of particular misconduct, namely, giving relief to persons not fit subjects for it, that the pleas which do not allege any misconduct of this particular description, but a general misapplication of the funds or property of the Union, which would be supported by showing that he simply converted the same to his own use, or had given too much to persons who were fit subjects of relief, cannot be sustained. The cases which have been cited by plaintiff's Counsel, namely, *Smith v. Carey* (a), *Black v. Holmes* (b), clearly establish that if a plaintiff by his innuendo attributes a particular meaning to the words used, he is bound by the meaning so assigned; and whether slanderous *per se*, or only by means of an innuendo, that the plaintiff will fail on the general issue, unless the jury be of opinion that the words were used in the meaning alleged in the declaration. We are of opinion that it necessarily follows from this that a plea, showing a state of facts which would justify the words if used in a different

(a) 3 Camp. 461.

(b) Fox & Smith, 28.

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sense from that stated cannot be supported; and if express authority were wanted, the case of *Edsall v. Russell* (a) furnishes it. The words used in that case were "he killed my child;" it was the saline injection that did it; the innuendo was that the plaintiff had been guilty of homicide; the plea alleged that the death of the child was caused by the improper treatment of the child. This was held bad on demurrer, as though the plea would have been a good justification to the declaration, if the offence of manslaughter had not been thereby imputed, still it was no answer to the declaration containing such an innuendo. The defendant's Counsel contended, on the authority of *Lord Cromwell's case* (b), which is referred to and approved of in *Comyn's Digest*, tit. *Pleader*, 2, L 3, and several other cases, that it was competent for him to show by special plea that he used the words in a sense different from that stated in the declaration, and justify the use of them in that other sense. Those cases do not in our opinion apply to the present case, as the plea here contains no allegation that the words were used in that other sense; but by not traversing the declaration, admits in fact that they were used in the sense stated in the declaration, and pleads a state of facts which would justify them only if used in that other sense. We are therefore of opinion that the pleas in this case are bad on demurrer.

But then the defendant's Counsel argues that the three counts of the declaration to which the pleas have been pleaded are bad on general demurrer. And the objection to the declaration is stated to be this, that it is not sufficient in the declaration to state that the words were spoken of the plaintiff in his character of relieving-officer, and that they imputed particular misconduct to him as such relieving-officer; but that unless the words used themselves show that they were spoken of the party as such relieving-officer, and that they imputed the misconduct alleged, such extrinsic facts as are necessary to show that such was their meaning must be alleged; and as the words used in the present case are, "you are a common robber; you robbed the parish of Castleraghan," it is necessary that there should be some averment or statement, in some

(a) 4 M. & G. 1090.

(b) 4 Rep. 12, a.

way connecting the parish with the plaintiff's duties as relieving-officer, and that though there is an allegation in the innuendo that the parish was within the Union of which plaintiff was one of the relieving-officers, still that in the innuendo it cannot have the effect of an express averment; and even if it had, yet as the plaintiff was relieving-officer, not for the Union, but for the electoral division of Castleraghan, that it was not sufficient to show that the parish was within the Union, but that it should appear to have been within the electoral division of which the plaintiff was relieving-officer.

The cases cited by Mr. *Coates*, and which are referred to and collected in the note to 1 *Saunders*, p. 243, show that an innuendo is only explanatory of some matter already expressed, it serves to point out where there is precedent matter, but never for a new charge; it may apply what is already expressed, but cannot add, enlarge or change the sense of previous words. We are therefore of opinion that the statement in the innuendo, that the parish in question was in the Oldcastle Union, cannot be considered as an independent averment of that fact, even if that averment would be sufficient to sustain the declaration, and therefore the case must be dealt with as if the declaration contained no statement that the parish in question was in any way connected with the Union or electoral division of which the plaintiff was relieving-officer, inasmuch as although the plaintiff is stated to have been relieving-officer of the electoral division of Castleraghan, the mere identity of name is not sufficient to connect the parish with the electoral division. We are of opinion that the objection is well founded, and that without some averment in some way connecting the parish with the Union or electoral division of which the plaintiff is relieving-officer, the three first counts of the declaration are bad on general demurrer, and therefore that the demurrer must be overruled and judgment given for the defendant. Still, as the objection was not raised by demurrer, in which case plaintiff might have allowed the demurrer and applied to amend, we think that the plaintiff should have liberty to amend, if he thinks right to do so, on the usual terms of payment of costs. The order therefore will be—

That the plaintiff be at liberty to amend within ten days on

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payment of the costs of the pleas and all subsequent proceedings, including the argument of the demurrer, and entering the rule to plead *de novo*; and in default of amendment within ten days, let the demurrer be overruled, and judgment entered for the defendant.

O'BRIEN v. KELLY and another.

June 16.

A defendant having entered and served the rule for judgment of non-pros. before the expiration of six months from the date of his appearance, may mark judgment pursuant thereto at any time within the year from the service of such rule.

WEST, on behalf of the plaintiff, moved to set aside the judgment of non-pros. in this cause, on the ground that it had been entered more than a year after the defendants' appearance. The writ of *capias ad respondendum* in this cause issued on the 11th of April 1850, to which the defendants entered a joint appearance on the 25th day of the same month. On the 12th of June 1850, the defendant entered the rule for non-pros., from which time no further proceedings were taken in the cause until the 5th of June 1851, when judgment of non-pros. was marked.

West, in support of the motion, contended that the plaintiff at the end of six months was, under the terms of the 49th General Order of the day, out of Court, and could not declare. The defendant could not therefore enter the rule for non-pros. as the cause was at an end: *M'Rory v. Bareskill* (a).—[BALL, J. In that case the rule for non-pros. had not been entered until more than a year after the defendant's appearance, and it was therefore irregular, and the judgment of non-pros., founded upon that irregular rule, was set aside.]—In *Rorke v. M'Carthy* (b) the rule was entered within the year.—[BALL, J. In that case the rule was not served. There was nothing more than an entry of the rule.]

(a) 1 H. & B. 507, n.

(b) 6 Ir. Law Rep. 29.

C. Kelly, for the defendant.

Under the former practice the defendant was, under the 27th General Order of Easter Term 1834, out of Court at the end of twelve months, so far as related to any benefit which he could himself derive from the continuance of the action; but that he was not considered out of Court for all purposes, is plain from the fact that the rule for non-pros. might have been entered on the last day of the year from the return of the writ, and the plaintiff might under the terms of the rule file a declaration within four days from that time. Under the New Rules, the plaintiff is out of Court at the end of six months, but in other respects the practice is not altered. A defendant must therefore enter the rule within six months from appearance; but having done so, he may enter the judgment founded upon that rule at any time within twelve months from that period.—[MONAHAN, C. J. It is analogous to entering judgment on the *postea*, the rule for which must be entered within four days; but the judgment may be entered at any time within a year from the entry of the rule.]

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West, in reply.

By the 47th General Order, when the plaintiff does not declare within two months from appearance, the defendant may enter a side-bar rule that the plaintiff declare in four days, or suffer judgment of non-pros; suppose the defendant to enter this rule the day before the expiration of the six months from appearance, the plaintiff can, on the construction for which the defendants' Counsel contend, by entering a side-bar rule under the 47th General Order, keep the plaintiff in Court for more than six months, notwithstanding the express terms of the 49th Rule.—[BALL, J. You must read the 49th Rule in connection with the 47th and 50th Rules. The words "unless he shall have obtained time to declare" in the former Rule refer to the further time which he may obtain under the latter Rules.—MONAHAN, C. J. Suppose you are right in your position, it only amounts to this, that by entering the rule, under the 47th section, you enlarge the plaintiff's time to declare.]—The defendants should have entered a side-bar rule under the 47th Rule, that

T. T. 1851. the plaintiff declare in four days.—[BALL, J. That Rule does not
Common Pleas. apply to cases in which the rule for non-pros has been entered.]

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*Per Curiam.**

We think, for the reasons we have before assigned, that there must be no rule on the present motion.

No rule.

* MOWHAN, C. J., BALL, J., JACKSON, J.

SMITHWICKE v. BEARY.

May 29.

If the plaintiff declare upon a deed, and there be no plea of *non est factum*, he cannot read any part of the deed which is not on the record, without proving it by an attesting witness.

COVENANT, for rent reserved by a lease dated the 1st day of March 1850.

Plea—Payment.

The case was tried before BALL, J., at the Spring Assizes 1851, for the county of Limerick, when a verdict was obtained for the plaintiff, subject to the opinion of the Court as to the reception in evidence of the lease of the 1st of March 1840. At the trial the defendant proved a *prima facie* case of payment by the production of receipts for small sums, stated to be "for balances of rent up to this time." The case sought to be established on behalf of the plaintiff was that the lease upon which the action was brought was a renewal of a former lease, made by the plaintiff to the defendant's father at a rent of £26; that the plaintiff himself held the lands under a person of the name of Considine at a rent of £7 per annum; and that the course of dealing between the plaintiff and the defendant's father had been for the latter to pay the head rent of £7 to Considine, the head landlord, and pay only the profit rent to the plaintiff; that the interest of the defendant's father became vested in the defendant, and the renewal upon which the action was brought was made to him; that the plaintiff continued to receive

from the defendant only the profit rent, and gave him the receipts produced, under the impression that the defendant had paid the head rent to Considine, which in fact had not been done; that the plaintiff was in consequence compelled to pay the head rent, which he sought to recover from the defendant in the present action.

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In support of this case the plaintiff proposed to read the recitals in the lease of 1840 for the purpose of showing it to be a renewal of the lease made to the defendant's father, but did not produce the attesting witness, or give any evidence whatever, relying on its execution being admitted by the plea of payment.

On the part of the defendant it was insisted that the plea of payment admitted only so much of the deed as was stated in the declaration, and that these recitals not being so stated could not be read. The evidence was admitted by the learned Judge, subject to the objection.

A rule having been obtained in Easter Term to set aside the verdict, and for a new trial, on this, amongst other grounds—

Deasy, with whom was *C. Barry*, now showed cause.

There being no plea of *non est factum*, the execution of the lease stated in the declaration was admitted; it then becomes a question of identity; and the lease which we produced corresponded in every particular with that stated in the declaration: *Bingham v. Stanley* (a); *Robins v. Lord Maidstone* (b). In *Bringloe v. Goodson* (c), in an issue joined on a plea of *non devisavit*, it was held that the defendant, by holding under a deed which recited the will, had admitted its execution; and that if there was any doubt of the identity of the will stated with that produced, the Judge should have been required to put the question on that point to the jury.—[MONAHAN, C. J. In that case there were other facts proved which went to establish the identity of the two documents.]

J. D. Fitzgerald, in support of the rule, relied on *Williams v. Sills* (d); *Gillett v. Abbott* (e).

(a) 2 Q. B. 117.

(b) 4 Q. B. 811.

(c) 5 Bing. N. C. 738.

(d) 2 Camp. 519.

(e) 7 Ad. & El. 783.

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The case of *Williams v. Sills*, cited from *Campbell's Reports*, seems to be exactly in point in this case; and although the previous case, *Hodgkinson v. Marsden* (a), in the same volume, may not go the length of deciding that you must in all cases call the attesting witness, it shows that you must give some evidence beside throwing down the deed, to identify the instrument produced with that declared upon. These cases have been expressly recognised by the Court of Queen's Bench in England in the case of *Gillet v. Abbott*; and with regard to the case of *Bringle v. Goodson*, it is observable that in addition to the circumstance of there being some intrinsic evidence to identify the instruments, the cases of *Williams v. Sills* and *Hodgkinson v. Marsden* were not cited. We cannot overrule these cases on a new trial motion, and therefore the cause shown must be disallowed.

BALL, J.

I own I have considerable doubts as to the propriety of the decision in *Bringle v. Goodson*; but that case, however, is distinguishable on the ground that there was evidence of identity *dehors* the instrument itself. But the cases referred to by my LORD CHIEF JUSTICE showed that in this case the lease could not be received in evidence without proof by the attesting witness.

JACKSON, J., concurred.

(a) 2 Camp. 121.

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FITZGERALD v. FITZGERALD.

June 6.

THIS was an action of covenant.—The declaration set out an indenture of the 1st of February 1792, made between Walter Fitzgerald of the one part, and Thomas Fitzgerald, grandfather of the defendant, of the other part, whereby the said Walter Fitzgerald demised to the said Thomas Fitzgerald the elder the lands of Gurteen; *Habendum*, unto the said Thomas Fitzgerald the elder, his heirs and assigns, for two lives, &c., the said Thomas Fitzgerald the elder and his heirs paying an acreable rent of eighteen shillings; and the said Thomas Fitzgerald the elder thereby for himself, his heirs, executors, administrators and assigns, covenanted that he, his executors, administrators and assigns, would from time to time during the said term pay to Walter Fitzgerald and his heirs the reserved rent. The declaration then averred the entry of Thomas Fitzgerald, and his death, leaving Colonel Thomas Fitzgerald his eldest son and heir-at-law, and the death of the latter, leaving the defendant his eldest son and heir-at-law, “who then and there became and was “the heir of his father the said Colonel Thomas Fitzgerald, and heir “of his grandfather the said Thomas Fitzgerald the elder.” The declaration then stated that Walter Fitzgerald by his will devised the reversion to the plaintiff, and averred the performance on the part of the plaintiff of the lessor’s covenants, and a breach by the defendant in non-payment of two years’ rent.

Plea, Actio non—Because he saith that he the said defendant hath not, nor at the time of the commencement of this suit, nor at any time before or since, had any lands, tenements or hereditaments by *hereditary descent in fee-simple* from his grandfather, the said Thomas Fitzgerald the elder, in the said declaration named.—*Verification.*

Special demurrer, on the ground that the plea does not state that the defendant hath not, nor had any lands, tenements or heredita-

To an action of covenant against the heir, on a covenant by his ancestor, for himself, his heirs, executors, administrators and assigns, the defendant pleaded that he hath not, nor at the commencement of this suit, nor at any time before or since, had any lands, &c., by hereditary descent in fee-simple, from his ancestor the covenantor.

Held, on special demurrer, to be bad for omitting to negative that the defendant had estates *per autre vie* by descent from the covenantor.

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ments, held by leases for lives, which came to him by descent from his said grandfather, or which came to him as heir by special occupancy, and that the plea tendered an immaterial issue.

Joinder in demurrer.

Hamilton Smythe, with whom was *Martley*, for the demurrer.

At Common Law the heir was only answerable in an action of covenant in respect of fee-simple lands by descent; but by the Statute of Frauds, 7 W. 3, c. 12, s. 9; it was enacted that estates *pur autre vie* shall be devisable, and that if no devise thereof be made, the same shall be chargeable in the hands of the heir, if they shall come to him, by reason of a special occupancy, as assets by descent, as in case of lands in fee-simple. This provision has been repealed by 1 Vic., c. 26, s. 1, as regards estates *pur autre vie* of any person dying before the 1st of January 1838, and re-enacted by section 6. The effect of these provisions is to place estates *pur autre vie* in exactly the same position as fee-simple estates. In an action against the heir on the obligation of his ancestor the former is sued in the *debet* and *detinet*: 2 Saund. 7 b, 8 a; and he cannot discharge himself from liability so long as he is in possession of lands of which his ancestor died seised. In 3 *Chitty on Pleading*, 5th ed., p. 973, the form of plea only extends to fee-simple lands; but in the 7th ed., the form of plea given at p. 186 of 3rd vol. includes lands of descendible freehold. The same form is given in *Chitty's Precedents*, by Pearson, p. 493, n. In 5 *Wentworth*, pp. 373, 377, the form is that the defendant has not any lands, tenements or hereditaments by hereditary descent, which would include estates *pur autre vie*. The same form is given in 7 *Wentworth*, p. 423. The form in the Sheriff's return to a *scire facias* is that the conuzor was seised as of fee or of a descendible freehold: *Keary Croghan* (a).

The following authorities were referred to:—*Panton v. Hall* (b); *Smith v. Angel* (c); *Atkinson v. Baker* (d); *Co. Lit.* 374, a; *Stephen on Pleading*, 2nd ed., p. 413.

(a) 3 Law Rec. O. S. 31.

(b) 2 Salk. 598.

(c) 7 Mod. 40; S. C. 1 Salk. 354.

(d) 4 T. R. 229.

Sherlock, with whom was *D. Lynch*, contra.

The demise, as set out in the declaration, is to the defendant, his executors, administrators and assigns. The lessee does not take as heir, but as special occupant: *Lyne on Leases*, p. 8; *Doe d. Blake v. Luxton* (a); *Dowell v. Dignam* (b).—[MONAHAN, C. J. Those cases refer to charging the heir with the rent reserved merely, and not as on the debt of his ancestor. Is there any precedent of a declaration against the heir charging him as special occupant?—We have not been able to find one. The precedents are all according to the form of the present plea: *Gifford v. Young* (c); *Redshaw v. Hester* (d); *Bushby v. Dixon* (e); *Brown v. Shuker* (f).—[MONAHAN, C. J. The difficulty I feel is, how is the creditor to obtain execution of lands held *pur autre vie*?—They are statutable assets, and if execution be sought against the heir in respect of them, it must be on a special declaration. With regard to the form of return in *scire facias*, the heir is sued there as terre-tenant and not as heir, and the execution is against the lands and not the person. It is therefore usual to include lands of descendible freehold; but under the terms of the Statute of Frauds, estates *pur autre vie* are not assets unless they come to the hands of the heir. It is necessary that the heir should do some act to testify his acceptance of the estate; he may disclaim, which he cannot do as regards lands in fee-simple, to the prejudice of his ancestor's obligation. The plea therefore answers the declaration so far as it seeks to charge the defendant as heir. If, in point of fact, the heir was in possession of land held *pur autre vie* the plaintiff may reply that fact.—[BALL, J. Would not that be a departure?—If so, that admits that the declaration would not charge the defendant in respect of lands of which he is special occupant.—[MONAHAN, C. J. If the declaration charges him effectually in respect of lands, of this description, your plea is no answer; if it does not, such a replication as you suggest would be a departure.]

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(a) 6 T. R. 289.

(b) Batty, 698.

(c) 1 Lutw. 290.

(d) 5 Mod. 120.

(e) 3 B. & C. 296.

(f) 1 Tyr. 400; S. C. 2 Cr. & J. 311.

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Martley, in reply.

The construction of the statute contended for would lead to this result, that the freehold would be in abeyance until the heir had entered. It has never been considered necessary to declare specially against an executor, in respect of estates *pur autre vie*. If issue were joined on a plea of *plene administravit*, and it appeared that the executor received assets of this description, he would be bound to administer them. It was not necessary for us to set out our adversary's title; it is sufficient to charge the defendant generally as heir.

MONAHAN, C. J.

In this case we do not think it necessary to take further time to consider our judgment. We are of opinion that the present demurrer must be allowed. It is quite clear there must be some mode of obtaining execution of estates *pur autre vie*, which, by the words of the Statute of Frauds, are made assets in the hands of the heir, if they shall come to him by reason of an intestacy, in the same manner as in the case of lands in fee-simple. With regard to fee-simple lands, the mode of proceeding against the heir is to charge him generally as heir, and it is then for him to show that he has not lands of that description. By the ninth section of the Statute of Frauds, it is enacted "That all estates *pur autre vie* shall be "devisable by a will in writing signed by the party so devising the "same, or by some other person in his presence, and by his express "direction, attested and subscribed in the presence of the devisor by "three or more witnesses; and if no such devise shall be made "thereof, the same shall be chargeable in the hands of the heir, if it "shall come to him by reason of a special occupancy as assets by "descent, as in case of lands in fee-simple." The industry and research of Counsel has not been able to furnish any instance in which, in proceeding against an heir, any allegation has been made on the declaration that he has estates *pur autre vie* by descent; and though a plea similar to the present has frequently been used without objection, still, as the question is now for the first time, that we are aware of, distinctly raised, we must put on the

statute what occurs to us to be its true construction; and that, we consider to be, that in proceeding to charge either heirs or executors in relation to assets of this description, no particular allegation or statement is necessary in the declaration, in relation to assets of this description, but that the heir or executor is to be charged generally as such, and that it is for him in his defence to show that he has no assets of any description. It has been suggested that though in the declaration no averment as to those assets might be necessary, still that it would be a proper subject of replication to the present plea. I think the answer already given to this is quite satisfactory—namely that, unless the declaration is sufficient to include assets of this description, such a replication would be a 'departure; and if the declaration is sufficient, the plea is no answer.

On the whole, therefore, we are of opinion the demurrer must be allowed; but as the question is a new one, and the defendant has adopted a form of plea in general use, we think he should have leave to amend on the usual terms.

TORRENS, J., BALL, J., and JACKSON, J., concurred.

Order, that the defendant be at liberty to amend on payment of costs; and in default, judgment for the plaintiff.

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Common Pleas.

MARY O'CONNELL,
 Administratrix of CONNELL O'CONNELL,

v.

MARY UNTHANK, Executrix of ROBERT S. UNTHANK.

June 16.

Where the defendant demurs to the copy of the declaration served pursuant to the 13 Vic. c. 18, and it afterwards appears that the copy does not correspond with the declaration on the file, and that the grounds of demurrer do not apply to the latter, the Court will permit the demurrer to be withdrawn.

And *semble*—If the Court are satisfied that the defendant's attorney was not aware of the variance at the time of filing the demurrer, they will compel the plaintiff to pay the costs occasioned by his mistake.

T. R. HENN, on behalf of the defendant, moved that the plaintiff be compelled to amend the copy of the declaration served upon the defendant so as to make it conformable with the declaration on the file, and to pay to the defendant the costs of the demurrer, and to enter the rules to plead *de novo*, and that thereupon the defendant be at liberty to withdraw his demurrer and plead anew.

The declaration was originally filed on the 21st of January 1851, and contained six counts.

The first four counts were for work done as an attorney, work and labour, money paid and money due on an account stated by R. S. Unthank to Connell O'Connell. The fifth count was for work done as an attorney by C. O'Connell for R. S. Unthank, and alleged a promise to the plaintiff, as administratrix; and the sixth count was for money found to be due "from the said *defendant* to the plaintiff as administratrix as aforesaid" on an account stated.

On the 30th of January the defendant pleaded to the first, third, fourth and fifth counts of the declaration the general issue; and to the first, second, third, fourth and fifth counts a plea of the Statute of Limitations, and demurred to the sixth count on the ground that the declaration did not show that the defendant was answerable as executrix.

On the 5th of May 1851, the plaintiff obtained an order to amend the declaration by inserting the name "Robert Simpson Unthank" for the word "defendant," on the terms of paying the costs of the demurrer, and serving the defendant with an amended copy of the declaration. On the 27th of May the declaration was amended, and

on the 5th of June 1851, the defendant again demurred, on the ground that she was described in the declaration by initials.

The affidavit of the defendant's attorney stated that, on proceeding to make up the demurrer books from the pleadings on the file, he discovered that the copy served did not correspond with the record; that he had then served the plaintiff's attorney with a consent in the terms of the notice for the present motion, to which he had received no reply. Counsel referred to *Palmer v. Robinson* (a).

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J. D. Fitzgerald and *Sir C. O'Loughlen*, contra, insisted that this was merely an irregularity, and that the defendant had not taken advantage of it in time; in the case of a writ which is irregular if it do not contain the plaintiff's residence, if the defendant appear, he cannot take advantage of it; that if the present motion succeeded, the most trifling omission in the copy served would entitle the defendant to institute a motion like the present; that supposing issue to be joined and a trial had according to the pleadings in the copies, and then a bill of exceptions, and that on making up the books it was found that the copies served do not correspond with the record, the judgment should, according to the practice contended for by the plaintiff, be set aside.

T. R. Henn, in reply.

MONAHAN, C. J.

We are of opinion in this case that the amendment required must be made. It was the duty of the plaintiff to have served a correct copy of the declaration; and we do not consider that the defendant was at all obliged, before filing his demurrer, to inspect the record, and compare the declaration furnished to him with it; and I do not think he would be allowed, on taxation, the costs of doing so; but in proceeding to make up the books for the Judges, it then becomes his duty to inspect the record and to make up the books from it; and accordingly, if the affidavit of the defendant's attorney had stated, as we think it ought to have done, that he had then for the

(a) *Infra*, p. 354.

T. T. 1851. first time discovered the variance between the copy served and the
Common Pleas. record, we should have compelled the plaintiff to pay the costs
O'CONNELL of this motion; but as it is consistent with that affidavit, that the
v. defendant's attorney was aware of the variance at the time the first
UNTHANK. demurrer was taken, we do not think that the present is a case to
 give costs.

The following order was made:—

It is ordered by the Court that the plaintiff be at liberty to amend his declaration, entering the rule to plead anew, and furnishing the defendant's attorney with a copy of such amended declaration, the amendment not to extend to a change of the venue. It is further ordered that the defendant's demurrer be withdrawn or set aside without costs, and that each party abide his costs of this motion.*

* See next case.

JOHN PALMER and ROBERT BOOTH

v.

RICHARD ROBINSON.

H. T. 1851.

Jan. 17.

In an action of debt on a civil-bill decree the declaration contained four counts. The first count stated that whereas the plaintiff, heretofore to wit, &c., at a General Sessions of the Peace holden at Birr, in and for the division of Birr and King's County, before divers Justices of our said Lady the now Queen, assigned to keep the peace of our by his process of the Assistant-Barrister, although the cause of action may have exceeded it.

On the argument of a demurrer to a declaration the Court must give judgment according to the declaration on the file, and not according to the copy served, pursuant to the 13 Vic. c. 18; although if the defendant have been induced to demur in consequence of having been served with an erroneous copy of the declaration, the Court may compel the party in default to amend, and pay the costs occasioned by his mistake.

said Lady the Queen in and for the said King's County, and to hear and determine divers felonies, misdemeanours and soforth, in and at a certain Court of our Lady the Queen, commonly called a Civil-bill Court, held in and for the said division of the said King's County, called the division of Birr, by and before, &c., then and there being Assistant-Barrister for the said King's County, duly nominated and appointed pursuant to the statutable enactments in such case made and provided, a certain cause by English bill or paper petition, usually called a civil-bill, in a certain action, to wit, an action of *indebitatus assumpsit*, for the sum of £19. 8s. 8d., for an account stated and settled between the said plaintiff and defendant; and also for the defendant's acceptance of the plaintiff's bill of exchange, bearing date, &c., payable three months after the date thereof, being respectively causes of action within the jurisdiction of the said Court, was heard and determined by the said Assistant-Barrister, in which cause the said John Palmer and Robert Booth were plaintiffs, and the said Richard Robinson was defendant; and process therein to appear at the said Sessions having been duly served upon the said defendant, who was then and there resident within the said division of Birr, and the said King's County, within the jurisdiction of the said Court; and such facts having been satisfactorily proved before the said Assistant-Barrister, thereupon such proceedings were had in the said cause, that it was then and there ordered and decreed by the said Court, then and there having competent jurisdiction in that behalf, and in every thing pertaining to the said cause, that the said plaintiffs should recover from the said defendant the said sum of £19. 8s. 8d., together with six shillings and three pence costs, the said sums making together the sum of £19. 14s. 11d.; and the several Sheriffs of the respective counties were thereby commanded, *non obstante*, &c., to enter, &c., and take in execution the goods of the said defendant to satisfy the said debt and costs; as by the said decree which was then and there marked for the said sum of £19. 8s. 8d. debt, the sum of six shillings and three pence costs, and the sum of one shilling for a warrant, making together the sum of £19. 15s. 11d., and was duly signed by the said Assistant-Barrister,

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H. T. 1851. *Common Pleas.* and also by, &c., as Clerk of the Peace for the said King's County,
 PALMER and also by, &c., as attorney for the said plaintiffs; and was also
 v. duly registered according to law in the book kept by the said
 ROBINSON. Clerk of the Peace for the said county for the entering and registering of causes heard and determined by the said Court by English bill or paper petition, usually called a civil-bill as aforesaid, and remaining of record unreversed and in full force, to wit, &c., will appear. Averment, that the plaintiffs had not obtained any satisfaction or execution upon said decree, whereby an action, &c.

The second count was in the following form on the record:—
 “And whereas also the said defendant afterwards, to wit, on &c.,
 “had become indebted to the said plaintiffs in the *further* sum of
 “£19. 15s. 11d., upon and by virtue of a certain decree or order
 “before then made in this Court of our said Lady the Queen,
 “commonly called a Civil-Bill Court, held in and for the said
 “division of the said King's County, called the division of Birr, by
 “and before the said, &c., then and there being Assistant-Barrister
 “for the said King's County, duly nominated and appointed pursuant to the statutable enactments in such case made and provided
 “as aforesaid, in a certain cause then and there depending in the
 “same Court, *wherein* the said plaintiffs were plaintiffs, and the said
 “defendant was defendant, by which decree or order the said defendant was decreed and ordered to pay to the said plaintiffs divers
 “sums of money amounting in the whole to a certain sum, to wit,
 “the said last mentioned sum of £19. 15s. 11d., which is still wholly
 “unpaid to the said plaintiffs, *per quod actio accrevit.*”

In the copy of the declaration served the word *whereas* was substituted for wherein, and a new paragraph commenced.

Special demurrer to the first count, on the ground that it did not show what was the particular amount of the bill of exchange, or that it was for a sum under £20, to which the jurisdiction of the Civil-Bill Court in such cases extends; and that it does not appear with certainty for what cause of action the Assistant-Barrister pronounced the decree in question.

As to the second count, which the defendant treated as two counts, the third count commencing with the word “whereas;” the

defendant demurred to the first part, which he treated as the second count, on the ground that it did not show who were the parties to the cause in which the decree was pronounced, or what amount was thereby ordered to be paid, nor why the plaintiffs demanded from the defendant the said sum of £19. 15s. 11d.; and to the third count, which he treated as commencing with the word "whereas" in the copy of the declaration served, on the ground that it did not state in what Court or before whom held, or where or how or by whom the defendants were ordered the said sum of money, or how an action had accrued to the plaintiffs.

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To the other counts of the declaration, which were on the bill of exchange mentioned in the first count, and on an account stated, the defendant pleaded the general issue.

O'Driscoll, in support of the demurrer to the two first counts.

With regard to the first count, it does not appear that the bill of exchange was for a sum within the jurisdiction of the Assistant-Barrister's Court.—[MONAHAN, C. J. It appears that the plaintiff only claimed a sum of £19. 15s. 11d.—JACKSON, J. It is immaterial for what amount the bill was, if he only claimed a sum within the jurisdiction of the Civil-bill Court.]—The second count claims *another* sum of £19. 15s. 11d. as due. In *Dempster v. Purnell* (a) the demand in the Inferior Court was in each of the counts stated to be for a sum within its jurisdiction; but as the consolidated sum exceeded the amount to which the jurisdiction extended, it was held that the proceedings were void. With regard to the second count the objection does not arise, as the demurrer books are now made up. In the copy served, the word "whereas" was inserted in the middle of what professes to be the second count, and a new paragraph commenced. On the declaration on the record the word is "wherein." This demurrer must, however, be argued as the pleadings stand on the copy served. In England the copy served is considered the declaration for the purposes of pleading.—[MONAHAN, C. J. In England the declaration is never filed except in cases where the plaintiff himself has entered an

(a) 4 Scott, N. R. 30; S. C. 1 Dow. N. S. 168; 3 M. & Gr. 375.

H. T. 1851. appearance for the defendant. If the defendant himself appears, the
Common Pleas. declaration is delivered, but not filed. According to our practice
PALMER the declaration is filed in all cases.]—On what document then is the
v. defendant to act?—[BALL, J. On the declaration as filed; if not
ROBINSON. it would lead to this result, that there would be a good declaration
on the file, and a demurrer to a document which was not the declaration, and that demurrer allowed; how could the record be made up?—In England the books are made up from the copies served.—[JACKSON, J. We have already stated that that practice does not apply in this country.]

E. M. Kelly, for the plaintiff, was not called on.

MONAHAN, C. J.

With regard to the demurrer to the first count, we are all of opinion that it cannot be sustained. With regard to the demurrer to the second count we are of opinion that, inasmuch as it cannot be supported on the record as it stands, it must also be overruled. We consider that on the argument of a demurrer, the Court must act upon the pleadings as they stand on the record, and that the demurrer books must be made up from them. We do not mean to say that it is necessary for a defendant in every case, before taking a demurrer, to examine the record and compare it with the copy served; but we do consider that on the argument of a demurrer the record is the document to which we must look. The defendant may, perhaps, demur, assuming the copy furnished to be correct; but if it afterwards appear that the copy was erroneous, and that the demurrer cannot be sustained on the record as it stands, he must abandon the demurrer, although the Court would probably, on an application for that purpose, compel the party who had furnished the incorrect copy to set the declaration right, and to pay the costs occasioned by the mistake.

TORRENS, J., BALL, J., and JACKSON, J., concurred.

Judgment for the plaintiff.

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GORMAN, Executor, v. FITZGERALD.

(*Exchequer.*)

May 9.

ASSUMPSIT, by the plaintiff, as executor of the last will of F. Mitchell, deceased.

First count—"For that whereas the defendant, on &c., at &c., "was indebted to the plaintiff as such executor, &c., in the sum of "£21, for the use and occupation of certain lands of the plaintiff as "such executor," &c.

Second count—An account stated with the plaintiff as executor, and promise and breach to the plaintiff as executor.

Demurrer special for want of *profert*, and general for misjoinder.

E. Sullivan, in support of the declaration.

Where an executor has the option of declaring as such, or in his personal capacity, he need not make *profert*: *Bac. Ab. Exor.*, O, citing *Crawford v. Whittal* (a); *Com. Dig. Pleader* 2, D 1, citing *Wallis v. Lewis* (b):—"But when the executor brings an action "which will be in his own right, though he name himself executor, "he need not make *profert*."

The naming himself executor in such case is but surplusage: *Partridge v. Strange* (c); *Hornsey v. Dymocke* (d); *Aspinall v. Wake* (e); *Large v. Atwood* (f)—[*Pigot*, C. B. That case went on a different principle, viz., that the *description* of the person does not decide the *character* in which he sues.]—*Williams' Exors.*, p. 1594; 2 *Stark*. p. 445. The two counts sued on here are, the first by the executor for use and occupation, and the second on an account stated with the executor. In the first case

On demurrer—Where an executor sues as such for a debt due to his testator, though on an account stated with himself as executor, he must make *profert* of the letters testamentary. Where he may sue in either his personal or representative capacity, the test of the necessity for *profert* is the capacity in which he appears on the record.

Sharp v. Shearman (12 Ir. Law Rep. 437) considered and upheld.

(a) 1 Doug. 4.

(c) 1 Flow. 81.

(e) 10 Bing. 51.

(b) 2 Ld. Ray. 1215.

(d) 1 Vent. 119.

(f) 1 D. & R. 551.

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the contract is with the executor himself, and he may bring debt for the rent in the *debet et detinet*: *Holman v. Chute* (a). As to the account stated with him as executor, he has the option of suing in his own right, the accounting itself giving the cause of action: *Needham v. Corke* (b); *Trueman v. Hurst* (c); *Williams' Exors.*, p. 748; *Blakesley v. Smallwood* (d). The consideration for the promise is the accounting.—[PIGOT, C. B. It must, however, be an accounting upon a debt; if there be no debt the accounting is a nullity. In the present instance the debt being due to the testator and the accounting being with the executor, you must connect them; show that one represents the other.]—In *Schofield v. Corbett* (e) the Court refused to import into the count that the debt was due to the testator: *Jones v. Jones* (f); *Jobson v. Forster* (g); *Dowbiggin v. Harrison* (h); *Hollis v. Smith* (i). From these cases it appears the executor may sue in his own right on an account stated with him as executor, and therefore need not make *profert*.—[PENNEFATHER, B. These are all cases of costs.]—Yet the ground of fixing the executor with costs was his right to sue in his personal capacity on an account stated with him as executor. Laying aside the technical rules of pleading, it is conclusive against the necessity of *profert* in this declaration that the two counts are of such a character as to estop the defendant from denying the title of the plaintiff. *Profert* therefore would have been an idle averment, and need not be made: *Steph. Pl.*, p. 195. In a count for use and occupation the defendant cannot deny the title of the party letting: *Cook v. Loxley* (k); *Phipps v. Sculthorpe* (l). So as to the account stated, the title of the plaintiff cannot be denied, the account being stated with him: *Peacock v. Harris* (m). The plaintiff's difficulty in this case arises from the decision of this Court in *Sharpe v. Shearman* (n). But the point on which that case was decided arose

(a) Cro. Jac. 685.

(b) 1 Free. 538.

(c) 1 T. R. 42.

(d) 10 Jur. 470.

(e) 6 N. & M. 527.

(f) 8 B. Moo. 146.

(g) 1 B. & Ad. 6.

(h) 9 B. & C. 666.

(i) 10 East, 293.

(k) 5 T. R. 4.

(l) 1 B. & Al. 52.

(m) 10 East, 104.

(n) 12 Ir. Law Rep. 437.

suddenly in argument, and none of the cases relied on for the plaintiff here were cited except two. To make a declaration bad for misjoinder it must be such as that the party *cannot* declare on the different counts in the same right: *Ord v. Fenwick* (a); *Lansfield v. Allen* (b). In *Webb v. Cowdell* (c) the counts were expressly in different rights. *Corner v. Shew* (d) has no application. The executor there was defendant, in which case he must be sued in his representative capacity: *Cowell v. Watts* (e). The judgment in such case must be *de bonis testatoris*. But granting the plaintiff can sue in only one capacity on the last count, he can sue in either on the first. The general demurrer must therefore fail, and the special being to the whole declaration is two large.

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James S. Greene, for the demurrer.

Sharpe v. Shearman is a conclusive authority. If Counsel for the plaintiff be right in his argument that the account stated creates a personal demand, it destroys his argument as to the distinction between the executor plaintiff and defendant. The accounting must rest on a previous debt: *Clarke v. Webb* (f). The executor may sue in his representative capacity on contracts made by him after the death of the testator, where the money recovered would be assets: *per Parke, B.*, in *Heath v. Chilton* (g). The party must be kept to the character in which he has put himself on the record, or gross injustice might follow; for instance, when the defendant has a set-off.—[*Sullivan* cited *Schofield v. Corbett*, that in assumpsit by administrator on an account stated with him as such, defendant cannot set off moneys due him from the intestate.]—*Hornsea v. Dymocke* does not apply. There is no authority for the proposition that an executor can sue in any other than his representative capacity on an account stated with him as executor. *Corner v. Shew* is an authority on this point: *Sharpe v. Shearman*.—[*PIGOT, C. B.* *Mr. Sullivan* has controverted *Sharpe v. Shearman*, and very ably.]

(a) 3 East, 104.

(b) 1 Bl. N. S. 592.

(c) 14 M. & W. 820.

(d) 4 M. & W. 163.

(e) 6 East, 405.

(f) 4 Tyr. 673.

(g) 12 M. & W. 637.

E. T. 1841. —The plaintiff has made his election of his character, and cannot repudiate it: *per* Bayly, J., in *Aspinall v. Wake*.—[PIGOT, C. B. In this case the question is, whether the plaintiff can sue on the second count in his individual capacity?—PENNEFATHER, B. The inference from an account stated with a person as executor is, that it is with reference to a debt due to the testator.]—In *Corner v. Shew* it is assumed that the account must be relative to matters in the lifetime of the testator, and leave to amend is taken.

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PIGOT, C. B.

We are all of opinion, though the declaration in this case has been supported with great ability and research, that the demurrer must be allowed. The demurrer is general for *misjoinder*, and special for want of *profert*. The argument in reply is, that there is no *misjoinder*, and that *profert* is unnecessary, because the plaintiff *might* have sued in his individual capacity on both counts. It is not a sufficient answer to the objection for want of *profert* that a party *may* sue in his individual capacity. The question is, in what capacity *does* he sue? and the authorities do not carry the case further than this. The case cited from *Douglas* was that of a party suing on a judgment obtained by himself, and his description as administrator then was considered mere surplusage. The case from *Lord Raymond* was decided on the same ground. Neither shows that the mere ability of the plaintiff to sue in a different capacity absolves him from the necessity of making *profert* when he elects to sue in his representative capacity. Mere ability therefore to assume a capacity when he has elected to adopt a different one is not a sufficient ground for claiming the privilege of the capacity he has eschewed. But there is no authority for the proposition, that on an account stated a party can rely on the mere accounting as giving him a right to sue in his personal capacity. The account stated must be founded on a debt to sustain it, otherwise it is, although *ex vi termini* it imports a debt between the parties, a *nudum pactum*. In the case of an executor it is an account stated on a debt between the same parties, because the executor represents the testator. But the cause of action can be acquired by the executor only

in his *representative* capacity, and therefore he cannot sue in his personal capacity for a debt due the testator. If this were otherwise, gross injustice might arise. If the executor could sue in his individual capacity for a debt due the testator, the defendant would be debarred from setting off any debt due by the testator to him, and the former would thus be enabled to defeat the just right of the latter. Some cases were cited in which the plaintiffs suing in a representative capacity were held liable to costs, and it was argued that this was on the ground of the direct relation created between the parties by the statement of an account. But these are not direct decisions on the question, at least not sufficiently so to influence our decision on the present case. The plaintiff endeavours to escape from the necessity of making *proferat* by alleging that he might have sued on both counts in his personal capacity. The case of *Sharpe v. Shearman* is a direct authority on that point, and must rule this case, having been itself decided on the authority of another case, in which, although there was no direct decision on the point, the opinion of the Court was obvious. I was not present at the decision of *Sharpe v. Shearman*, but I fully concur in the principles on which it was decided.

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PENNEFATHER, B.

I have nothing to add to the judgment of the CHIEF BARON. Upon the two authorities in the Queen's Bench and Exchequer it is impossible to put any other than the construction adopted in them on the present case.

LEFROY, B.

We are called upon, and with great ingenuity, to re-consider *Sharpe v. Shearman*. In so requiring us Counsel has found it necessary to impugn the case in the Exchequer in England. I feel no difficulty in resting on that case when fully considered, and see no ground for overruling the decision in *Sharpe v. Shearman*.

Demurrer allowed, with leave to amend, on payment of costs.

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Exchequer.

CALLAGHAN v. BRODRICK.

An unsealed writ of *fi. fa.* which has been executed may be amended by the addition of the seal on terms.

GREENE applied that the writ of *fieri facias*, which had issued in this case and been executed, might be amended by attaching the seal of the Court to it *nunc pro tunc*.

All writs of execution were capable of amendment: 1 *Fer. Prac.* p. 134. Whether the misprision be that of the officer of the Court or of the party: *Hunt v. Kenrick* (a).—[LEFROY, B. That was a case of *ca. sa.*; this is a *fi. fa.*; and other executions may have since been lodged, which would be prejudiced by granting this application.]—The Court of Queen's Bench granted an exactly similar application this Term: *Crinion v. Duff*. The English cases were *Smith v. Harward* (b), *Newnham v. Law* (c), *Shaw v. Maxwell* (d), collected in *Englehart v. Dunbar* (e), *Arnell v. Weatherby* (f), *M'Cormack v. Melton* (g).

Fitzgibbon appeared for the Sheriff.

PIGOT, C. J.

This is not a mere matter of form; the seal is that which makes the instrument a writ. We fear, lest in yielding to this application, we should be encouraging a laxity of practice in the attorney, on whom the law now devolves the preparation of the writ.

The Court finally made an order that "the plaintiff should be at liberty to seal the writ, plaintiff's attorney undertaking not to charge any costs of this motion against his client, and to abide any further order this Court might make with respect to costs, proceedings, or otherwise arising in consequence of this order."

(a) 2 W. Blk. 836.

(b) Sir T. Jones, 41.

(c) 5 T. R. 577.

(d) 6 T. R. 450.

(e) 2 Dow. P. C. 202.

(f) 3 Dow. P. C. 464.

(g) 1 Ad. & El. 331.

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Eschequer.

BEASLEY v. TYRRELL.

BRERETON, for the plaintiff (the devisee of the lessor), moved that the defendant should give an inspection of his lease to the plaintiff or lodge it with the officer of the Court. The plaintiff's affidavit stated her belief that only one part was executed, and that having searched among the title deeds of the lessor she found only the draft of the lease. There was no affidavit of the defendant: *Conyers v. Greene* (a).

Hobart, contra.

The Court will not compel a party to produce an instrument unless he hold as trustee for another: *Street v. Brown* (b); *Ratcliffe v. Bleasby* (c); *Smith v. Winter* (d).

PENNEFATHER, B.

The cases go to show that if there have been two parts executed, the Court will not interfere. There is every reason to believe there was only one part executed here. We will grant the motion; defendant to furnish plaintiff with a copy of his lease, and to produce the original on the trial.

(a) 1 Cr. & Dix, 166.

(c) 10 Moo. 523.

(b) 6 Taunt. 302.

(d) 6 Dow. P. C. 386.

In an action on a lease by landlord against tenant, the tenant will, on motion, be ordered to produce the lease for the purposes of the action, if it appear that only one part of the lease was executed, and that it is in the tenant's possession.

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Eschequer.

FITZPATRICK .v. DUNPHY.

In trover mere possession is *prima facie* evidence of property; and the defendant, to rebut it, must show a better title in himself or in a third party under whom the plaintiff does not derive.

TROVER for the value of bank notes to the amount of £150.

It appeared at the trial below, before Mr. Serjeant O'Brien, that the plaintiff had been shopman to the defendant for five or six years at a salary varying from £10 to £15 per annum. The defendant, during a temporary absence of the plaintiff, suspecting his honesty, broke open his trunk and discovered there in a pocket-book, which the defendant had lost, £150 in large notes. The plaintiff was thereupon indicted and tried before the Assistant-Barrister for embezzlement, and acquitted, the defendant being unable to prove property in the notes. The Assistant-Barrister, however, refused to order the notes to be returned to the plaintiff, who thereupon brought this action of trover.

On the trial the plaintiff, besides proving his possession of the notes, endeavoured, but unsatisfactorily, to account for the manner in which he had obtained so large a sum of money, considering the smallness of his salary, which was also in evidence.

The defendant offered no evidence.

The learned Judge told the jury that "possession was *prima facie* evidence of property; but that they were to consider whether such *prima facie* evidence was rebutted by the other circumstances proved in the case; and if they believed on the whole evidence the notes to be the property of the plaintiff, they should find for him; if not, they should find for the defendant."

Verdict for the defendant.

A conditional order was obtained this Term to set this verdict aside, for the misdirection of the learned Judge, and for a *venire de novo*.

Martley now showed cause.

The trial proceeded on the assumption, that if the plaintiff failed to prove that he came by the money properly, the irresistible conclusion was, that it was the property of the defendant, and on this the jury found.

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Eschequer.

PITPATRICK

v.

DUNPHY.

Lynch, in support of the conditional order.

The Judge left the question of property at large to the jury; not that if they believed the notes to be the property of the defendant they should find for him, but that if they did not believe them to be the property of the plaintiff, they should find for the defendant. We called on the learned Judge to tell the jury that "unless they believed the notes found in the plaintiff's possession to be the property of the defendant they should find for the plaintiff, and that there being no evidence of that, they should find for the plaintiff." Possession is *prima facie* evidence of property, unless rebutted: *Armory v. Delamirie* (a); *Bassett v. Maynard* (b). Unless defendant could bring himself out of the character of a wrongdoer, the Judge should have directed a verdict for the plaintiff.—[LEFROY, B. But for the latter clause of the charge I should hold it correct.—PENNEFATHER, B. Possession in trover is not property, but evidence of property; but if that be displaced, no matter how, being only evidence of property, must not the plaintiff prove property *aliunde* to entitle him to recover?—Under the New Rules of pleading in England it has been held that a plea of "no property" means no property as against the defendant: note to *Armory v. Delamirie*.

PENNEFATHER, B.

With every disposition to sustain this verdict, if consistent with legal principles, we think the case was not submitted to the jury as it ought to have been. The action was trover for the value of bank notes to the amount of £150, which the defendant alleged were stolen from him by the plaintiff. To sustain the plaintiff's case

(a) 1 Smith, L. C. 151.

(b) Cro. Eliz. 819.

E. T. 1851. evidence was given that the notes were taken out of his trunk in his absence by the defendant; and it appeared that they were found in a pocket-book of the defendant. The smallness of the plaintiff's salary was also in evidence. The evidence for the plaintiff was that of possession alone; and it was contended that the Judge should have told the jury that this was evidence of property, and that unless the defendant gave evidence of property in himself the plaintiff's evidence was un rebutted, and they should find for him. The Judge declined to do so, but told the jury "that if they believed the notes to be the property of the plaintiff, they should find for him; if not, they should find for the defendant." There was evidence in the case to warrant the jury in finding the property to have been the defendant's. But that question was not left to them.

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The question resolves itself into this:—If possession of personal property be evidence against a wrongdoer, does not that continue until a better title is shown in some one else, and could it be shown in this case in any one else but the defendant? Could his character of wrongdoer cease in any other way than by showing the property to be in himself? If possession be *prima facie* evidence of property, can a stranger put the plaintiff on further proof of property without showing a better title in himself? Can he, by a wrongful act, change places with the plaintiff, and get rid of the established rule of law? A special property in trover is sufficient, and possession may be evidence of either general or special property. The opposite party must get rid of this by showing property in himself better than the plaintiff's special title. It appears to us therefore that the learned Judge did not submit this question as he ought to the jury, and that it should have been left as required by the Counsel for the plaintiff. We cannot intend that it so came before them, and therefore this verdict must be set aside.

LEFROY, B.

I come to the same conclusion on the last paragraph of the Judge's report, which prevents me from inferring that the true question was left to the jury, or that they found on it. The jury

were directed to find for the defendant if they believed the notes were not the property of the plaintiff. I desire to found my opinion on the case being left to them specifically in that way; because, if the property was shown to be in a third party, under whom the plaintiff could not derive, he ought not to recover. That question was not left to the jury—viz., whether the notes were the property of the defendant or of any one else. They were left to find a negative. If they negatived the property in the notes being in the plaintiff, they were directed to find for the defendant.

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Rule absolute for a new trial.

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Ex parte ALLEN.

*(Queen's Bench.)*April 16.

An attorney is eligible to be appointed a Commissioner for taking affidavits. MARTLEY applied on behalf of Henry Allen that he be appointed a Commissioner for taking affidavits at Queenstown, in the county of Cork. Mr. Allen is an attorney, and his certificate has been signed by gentlemen of all Professions.

BLACKBURNE, C. J.

I will make the order for the appointment; there is no rule of this Court that an attorney should not be eligible to the office; but where there are two candidates, both equally qualified in other respects, the Court prefer appointing the person who is not an attorney.

THE GUARDIANS OF THE POOR OF THE
WATERFORD UNION

v.

WALTER WALSH.

April 25, 26.

A bond was made to A B and C D, "paid officers duly appointed for the purpose of carrying into execution, within the Waterford Union," the provisions of the Poor-law Act; and the recital in the condition of which bond required the money to be paid to them, their attorney, successors or assigns. The Guardians of the Union declared on this bond by their corporate name; *Held*, on demurrer, that they are not entitled to sue in their corporate capacity. DEBT on a bond.—The declaration stated that the Guardians of the Poor of the Waterford Union complained of Walter Walsh. For that whereas the defendant, on &c., at &c., by his writing obligatory,

dated the 14th of June 1848, acknowledged himself to be held and firmly bound to William Henry Cooper Marratt, Justice of the Peace, and John O'Connor, Justice of the Peace, paid officers, duly appointed for the purpose of carrying into execution within the Waterford Union the provisions of a certain Act, entitled, &c., in a sum of £500, to be paid to the said W. H. C. Marratt and John O'Connor, or their certain attorney, successors or assigns.

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It then averred that the plaintiffs, as Guardians of the Poor of the Waterford Union, were, by virtue of the several statutes, successors of the said W. H. C. Marratt and John O'Connor, paid officers, so appointed for the purpose of carrying into execution the said several statutes within the Waterford Union. *Breach*, that the defendant did not pay the said sum of £500 to W. H. C. Marratt and John O'Connor, paid officers as aforesaid, or either of them, or their attorney or assignee, or the attorney or assignee of either of them, or to any of their successors from time to time, or to the plaintiffs, so being their present successors.

The defendant craved oyer of the bond and the condition. The condition was as follows:—

“Whereas by an order bearing date the 20th of April 1839, “under the hands and seal of the Poor-law Commissioners, acting “under the powers and authorities of an Act of Parliament passed in “the 1 & 2 *Vic.*, intituled, &c., it was declared that certain townlands “should be united for the relief of the destitute poor by the name of “the Waterford Union, and that a Board of Guardians should be “elected for such Union, and such Board of Guardians were elected “accordingly. And whereas by an order dated the 23rd of “March 1848, the elected board was for the reason therein stated “duly dissolved. And whereas by another order dated the 25th of “March 1848, the said William H. C. Marratt and John O'Connor “were appointed paid officers for carrying into execution in the “said Union the provisions of said Acts, and thereupon entered “upon their duties as such paid officers. And whereas all the “powers and authorities of the said Poor-law Commissioners under “the said Acts are now vested in the Commissioners for administering the laws for relief of the poor in Ireland. And whereas by a

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"certain other order bearing date the 5th of June 1844, the said
 "Poor-law Commissioners directed the said Board of Guardians to
 "appoint one or more fit person or persons to be collector or
 "collectors of the poor-rates in the said Union. And whereas at a
 "meeting of said paid officers acting as aforesaid, held on the
 "14th of June 1848, the above-bounden Michael Fitzpatrick was,
 "in pursuance of said order, duly appointed such collector. And
 "whereas the said Michael Fitzpatrick hath been required to enter
 "into said security in a bond with two sureties to William H. C.
 "Marratt and John O'Connor, as such paid officers, in the penalty
 "hereinbefore mentioned, to be conditioned as hereinafter set forth,
 "and hath requested the above-bounden Walter Walsh and David
 "Delahunty to join with him as such sureties in the above bond,
 "subject to the condition hereinafter contained, to which they have
 "assented, and the said paid officers have agreed to accept of them
 "as such sureties accordingly.

"*Now the condition* of this obligation is such, that if the above-
 "bounden Michael Fitzpatrick do and shall from time to time
 "and at all times hereafter, whilst he shall be employed in the
 "said office of collector of poor-rates as aforesaid, and until he shall
 "be discharged therefrom by an order from the said Commissioners,
 "or by and with their assent shall cease and discontinue to hold said
 "office as prescribed by the Commissioners, and collect the whole rate
 "and assessment lawfully recoverable, as the same shall be comprised
 "in a warrant to be received by him the said collector from the Board
 "of Guardians of the said Union within six months from the date
 "when the said warrant shall be delivered to him the said collector,
 "and pay the amount of the rates collected by him weekly to the
 "Treasurer of the said Union, or oftener when the sum collected by
 "him shall amount to £50; and shall from time to time, and at all
 "times when lawfully required so to do, deliver to the person or
 "persons authorised to require the same, true and perfect account
 "in writing under his hand of all moneys which shall have been
 "received by him by virtue of his said employment, and of all
 "moneys paid by him to the Treasurer, together with the proper
 "vouchers of such payments, and shall verify his account upon

"oath when thereunto lawfully required; and shall deliver to
 "such person or persons as aforesaid, within seven days after being
 "thereunto lawfully required, all the books, papers and writings in
 "his custody or power relating to the affairs of the said Union, and
 "shall immediately thereupon pay such moneys as upon the balance
 "of any account or accounts shall appear to be in his hands to the
 "said Treasurer, and shall in all other respects duly, fully and
 "faithfully observe, obey, perform, fulfil and keep all the enact-
 "ments, laws, rules and regulations contained in the Acts which
 "are or shall be at any time in force for the relief of the destitute
 "poor in Ireland, or in any order of the Poor-law Commissioners
 "touching and concerning the collection of poor-rates as aforesaid;
 "and if the said Michael Fitzpatrick do not and shall not commit,
 "or cause or suffer to be done or committed, any act, matter or
 "thing whatsoever whereby or by means whereof the said paid
 "officers or their successors shall or may or can be wronged,
 "defrauded or prejudiced in the rates and assessments aforesaid, or
 "any of them, then the foregoing bond and obligation shall be void."

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The defendant thereupon pleaded *non est factum*, and secondly, performance.

The plaintiffs joined issue on the first plea, and replied to the second, assigning several breaches thereon, and to this replication the defendant demurred.

Joinder in demurrer.

Meagher, with him *Martley*, in support of the demurrer.

The only question in this case is, whether the plaintiffs can sue on this bond in the manner they have described themselves, or are they the persons so to do? The 26th section 1 & 2 *Vic. c. 56* (the Act for the Relief of the Destitute Poor) empowers the Poor-law Commissioners to appoint paid officers when the ordinary Guardians fail in the performance of their duties. The 27th section incorporates the Board of Guardians and declares them to be a body politic and corporate, and enables them to sue and be sued by the name of the Guardians of the Poor of the — Union. The naming the individuals constituting a Corporation does not thereby

E. T. 1851. make them a Corporation: *Grant on Corporations*, pp. 1, 3. Here
Queen's Bench the bond is not passed to the Corporation; it is passed to the Guar-
WATERFORD dians by name. If the action were brought in the name of the
UNION persons named in the bond, we could not dispute our liability:
v. *Bradley v. Holdsworth (a)*; 14 *Vin. Abr.* 28, pl. 6.
WALSH.

Harris and D. Lynch, contra.

The 25th section of the statute gave the same power to paid officers as to Boards of Guardians elected by the rate-payers; and if this demurrer be allowed, it would amount in effect to this, that the Guardians had no right of action whatever. A Corporation may enter into contracts by one name and sue by another; *College of Physicians v. Butler (b)*.—[BLACKBURN, C. J. Even by describing them in the bond as paid officers, you do not thereby describe them in their corporate name.—MOORE, J. That case you rely on is distinguishable from the present. There the Corporation sued by name, but the right to sue was given to the president alone.]—So in this case the Act enables the paid officers to sue.—[BLACKBURN, C. J. Yes; but they are the Guardians *pro tempore*.]—They could not sue in their own name: *Wills v. Sutherland (c)*. Here the contract is in substance made with the Guardians. This is a question on general demurrer, and the declaration is to be read as if the condition of the bond were set out in it; and that condition is, that the bond was executed in pursuance of an order directing the Guardians to take this bond; therefore the designation "paid officers" is not to be taken merely as a description, but as the character in which they are acting. In the 31st section of the statute, and all through it, they are recognised as such.—[MOORE, J. Could you on the bond alone, without the condition, contend, on general demurrer, that you could maintain the action against the Guardians?]
—Yes; for the only answer to that action would be that there were no paid officers; but the condition puts an end to that; therefore the case, as it now stands, is to be taken as if it contained a distinct allegation to that effect. When the defendant entered into that contract with the paid officers he

(a) 3 M. & W. 422.

(c) 4 Ex. 211.

(b) 1 Sir. Wm. Jon. 262.

entered into a contract entitling them to enforce that contract as
Guardians: *Chapman v. Milvain* (a).

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Martley replied.

It is said that paid officers are known characters, and the Court finding they acted in that character, that they must attach to them the legal consequences of that character. Now, if a party be named as an executor, that alone will not attach on him the legal consequences of an executor.—[MOORE, J. I would agree with you, if we had nothing but the declaration alone to look to; but the difficulty is whether the ambiguity be not cured by the bond?—I admit they are paid officers; but although that be their official denomination, yet when they were appointed they were bound to contract as Guardians; the bond therefore would have been properly passed to them only as Guardians.—[MOORE, J. Suppose the bond were passed to A B as executor, I take it that is a mere description; but suppose there be a condition to that bond reciting and showing that he was dealing in that character, could you not interpose between the word "executor" the words "as executors?"—BLACKBURN, C. J. The question is, was the bond executed in a personal or corporate capacity? Now, on the record here it appears it was passed to the persons named as paid officers.]—The 27th section of the statute enables them to sue as Guardians. No matter for whose benefit the contract was entered into, the party to sue must be the covenantee.—[MOORE, J. Suppose a bond passed to A B without any description; but suppose it was named in the condition of that bond that A B was executor, and that in declaring on the bond he stated it was passed to him in his executorial capacity, would not the bond be controlled by the condition?—If the bond were passed to him personally it is a specialty contract, and the description cannot alter the legal effects of it.

Cur. ad. vult.

BLACKBURN, C. J.

This action is on a bond, brought by the Guardians of the Poor of April 26.

(a) 5 Ex. 61.

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the Waterford Union in their corporate capacity. They, as all other similar bodies, are incorporated by the 27th section of 1 & 2 Vic. c. 56, and the corporate name is the same, whether the members be Guardians elected by the rate-payers, or paid officers appointed by the Poor-law Commissioners. The bond on which they sue is not made in the corporate name; it is made to persons described to be, and who, by the recital of the condition, were paid officers duly appointed, and the money is to be paid to them or their lawful attorney, successors or assigns. Unless we decide that this is to be deemed to be taken to denote the Corporation, the plaintiffs cannot recover.

The general rule of law is, that a Corporation can only take by its corporate name. The Chapter of St. Stephen was incorporated by the name of the Dean, Canons and Vicars of St. Stephen; a grant by the name of the Presbyters and Chaplains of St. Stephen and their successors was held void: *Brook's Abr. Corporation*, p. 165. Yet there the words of the grant were so general as to comprise all who constituted the Corporation. The case before us is one in which the obligation is to two individuals by name, who are in fact paid officers, and who in fact and law were then the constituted members of the body. The case cited from 14 *Vin. Abr. Grant. pl. 6*, though it is that of a grant by, and not to, a Corporation, shows the absolute necessity of using the name of the Corporation; for there an Abbot and Monks granted in their own names and not in the name of the Corporation; and though the grant was made under the corporate seal, it was void.

It was contended, however, that we might control or explain the words of the obligation by the recital of the condition set out on oyer, and which show that the bond was made to the paid officers, and that they being Guardians, we are to hold this to be a bond made to them in their corporate capacity. Now, however plain the purpose and objects of the parties, we have no power to read this instrument as if it contained the corporate names. My Brother MOORE has furnished me with an authority that is completely in point; it is *The King v. Patrick and Pepper (a)*. In that case the

(a) 1 Leach, Cr. C. 253.

prisoners were indicted for cutting down trees in Enfield Chase. The first count in the indictment laid the property as belonging to Joseph Browne, George Cook and William Sedcole, then being the churchwardens of Enfield Chase, &c., and they the said J. B., G. C. and W. S., then being the owners of said trees. The second count laid the property to belong to the same persons by name, they the said J. B., G. C. and W. S. then being the churchwardens of the parish church of Enfield; and it was submitted that a conviction could not be sustained on this indictment; for that instead of laying the trees to be the property of the Corporation by their public name, it had laid them to be the property of the individual members composing such Corporation by their private names. The Court held the objection fatal; for the Act of Parliament gave the churchwardens a corporate capacity, and when any description of men are directed by law to act in a corporate capacity, their natural and individual capacity as to all matters respecting the subjects of their incorporation is totally extinct. There it is to be observed, though the name of the Corporation entitled to the property was stated in both counts of the indictment, yet it was laid to be in the individuals who constituted the body, and it was held to be bad. The demurrer therefore must be allowed.

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Demurrer allowed.

MICHAEL M'KEON v. JOHN H. BOLTON.

May 8.

TRESPASS on the case.—The declaration stated that the defendant was possessed of a messuage, situate in George's-street in Kings-

A car proprietor brought an action for damages sustained by a

vehicle of the plaintiff, in consequence of some rubbish having been brought out of the house of the defendant and left in the street opposite his dwelling-house by a person employed by the defendant to remove the rubbish. The jury having found that the service for which the man was employed was to remove the rubbish entirely; *Held*, that this was but the ordinary duty of a servant, and not done as a contractor, and that the defendant was liable.

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town, which street had been and still was a common public street or highway for all persons to go, return, pass and re-pass in, by and with coaches, chariots and other carriages at their free will and pleasure; yet he defendant, well knowing the premises whilst he was so possessed, to wit, on &c., wrongfully and unjustly put and placed large quantities of materials, dirt and rubbish on the said street near to the said messuage, and wrongfully and injuriously kept and continued the same therein, and during the night time of that day, without fixing or placing, or causing to be fixed or placed, any light or signal at or near such dirt or rubbish to denote or show that the same were there as aforesaid, by means and in consequence of which negligence and improper conduct of the defendant afterwards, to wit, &c., a certain carriage of the plaintiff of the value of £60, then and there passing and going in and through the street, was accidentally driven upon and against said dirt and rubbish, and was thereby then and there overturned, by means whereof the carriage was then and there broken and damaged, and the plaintiff was forced to lay out and expend the sum of £40 in and about the repairs of the same.

The second count stated the injury to be to a jaunting-car of the plaintiff used for the purpose of carrying passengers, and that by means thereof he was deprived of its use for two months.

Plea—The general issue.

The trial took place before the LORD CHIEF JUSTICE in the Hilary After-sittings, and these facts appeared:—The plaintiff was a car-owner, plying his vehicle for carrying passengers, and the defendant Bolton was a confectioner, resident in Kingstown. Bolton was in the habit of employing a person called William Daly to clear out the ashpit attached to his house, and that on the night when the accident happened, Daly, who was employed by the defendant's wife so to do, had removed the dirt from the defendant's house and left it lying on the street before defendant's door. In the interval of leaving it on the street and carrying it away, the plaintiff, driving some persons on his car, came along the street and the car was upset on the rubbish, and the plaintiff's car somewhat injured. Damage was proved to the amount of £23. It was contended for the defendant

that he employed Daly to carry away the contents of the ashpit, and that Daly by leaving them on the street acted against the terms of the contract, which was to cleanse out the pit and draw away the contents. It appeared on cross-examination that Daly, after he had deposited the contents of the ashpit on the street, had come into the defendant's shop and was paid one shilling on account of the work, and that defendant's wife refused to pay him more until the rubbish was taken away. Daly himself was produced as a witness for the plaintiff, and he swore he was employed in both ways, one for putting out rubbish on the street, and the other for carrying it off, and that his then contract was merely to put it on the street.

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An issue was left to the jury to say if the contract was an entire one, and not merely one to remove the rubbish to the street, and the jury found that the contract was an entire one to remove the rubbish altogether, and not to the street merely, and therefore his Lordship directed a verdict to be found for the defendant; but on the suggestion of the CHIEF JUSTICE, to avoid the expense of another trial, he advised them to assess damages if the Court should think the defendant liable, and the jury accordingly found for the plaintiff £12 if the Court thought defendant so liable.

A rule nisi was therefore had that the verdict entered for the defendant be set aside, and a new trial had, or that a verdict be entered for the plaintiff for £12 on the ground of misdirection, and on the objection made at the trial, and the matters reserved by his Lordship, and cause was now shown by—

Martley and Adair.

Where a person enters into a contract with another, the contractor alone is liable for any injury occasioned by the work; and if Daly were employed to carry away the ashes he was a contractor, and therefore the defendant could not be liable. *Laugher v. Pointer* (a) was the case of the owner of a carriage hiring of a stable-keeper a pair of horses to draw it for a day, and the owner of the horses provided a driver, through whose negligent driving an injury was done to a horse belonging to a third person, and it was held that the

(a) 5 B. & C. 547.

E. T. 1851. owner of the carriage was not liable to be sued for such injury.
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Quarman v. Burnett (a) establishes the same position; and it was there further held that it made no difference that the owners of the carriage had always been driven by the same driver, he being the only coachman in the employ of the owner of the horses, or that they had paid him a fixed sum for each drive: *Rapson v. Cubitt* (b). There the defendant was a builder, employed by the Committee of a Club to execute certain alterations at the Club-house, including the preparation and fixing of certain gas-fittings; he made a sub-contract with a gas-fitter to execute this part of the work, and in the course of doing it, through the gas-fitter's negligence, the gas exploded and injured the plaintiff; and it was held that the defendant was not liable in case for this injury: *Milligan v. Wedge* (c). If Daly were not a servant of the defendant, he was a contractor, and in no respect could the defendant be liable: *Allen v. Hayward* (d); *Knight v. Fox and Henderson* (e). There A contracted with a Railway Company to construct a branch line, and made a sub-contract with F. and H. to erect a bridge for part of the line. C, who was foreman to F. and H., at a salary, contracted with them for a specific additional sum to erect the necessary scaffolding for the bridge, F. and H. furnishing the materials. An accident happened to the plaintiff for want of light to enable him to see a poll of the scaffolding which rested on a sleeper on the highway, and it was held H. and F. were not liable. The general nature of the duty and the specific act to be done are different, and the jury have found that Daly was employed in this particular calling to do the work.—[MOORE, J. A great deal depends on the nature of the duty to be done.]

T. O'Hagan and O'Driscoll, contra.

Even on the finding of the jury, that the contract was to remove the stuff merely out of the ashpit, that was done in discharge of

(a) 6 M. & W. 499.

(b) 9 M. & W. 710.

(c) 12 Ad. & El. 737.

(d) 7 Q. B. 960.

(e) 20 Law Jour. Exch. 9.

Daly's duty as the servant of the defendant; and the doctrine would be a dangerous one to hold that a man employed to do a work in the character of a servant precludes the employer from being held liable. The law is settled that when the occupier of a house has a nuisance or obstruction existing in the neighbourhood of it, and an accident result from its existence, the occupier is liable: *Bush v. Steinman* (a). A, having a house by the road side, contracted with B to repair it for a stipulated sum. B contracted with C to do the work, and C with D to furnish the materials. The servant of D brought a quantity of lime to the house and placed it on the road, by which the plaintiff's carriage was overturned, and it was held that A was answerable for the damage sustained.—[MOORE, J. If a man took down the front of his house by contract, and the contractor put up a scaffold, and from its imperfection some accident occur, is the owner of the house liable?—We contend he is.—[MOORE, J. Was the act here done by Daly as a servant or as a contractor? I think that issue should have gone to the jury.]—This was a nuisance and obstruction which the defendant himself caused by agreement with Daly, and the accident being the immediate result of that agreement, the defendant is liable; and that view of the case is distinct from the question of Daly being servant or contractor: *Leslie v. Pounds* (b). Case lies against the landlord of a house demised by lease, who, under a contract with his tenant, employs workmen to repair the house, for a nuisance in the house occasioned by the negligence of his workmen. *Mathews v. West London Water Works Company* (c) also decided that an action on the case may be maintained against an incorporated Company, where workmen, employed by persons who contract with the Company to lay down pipes for conducting water through a public street, do the work in a negligent manner, whereby an individual passing along the street receives an injury: *Randleson v. Murray and another* (d). There a warehouseman employed a master-porter to remove a barrel from his warehouse, and the master-porter employed his men and tackle, and

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(a) 1 Bos. & Pul. 404.

(c) 3 Camp. 403.

(b) 4 Taunt. 648.

(d) 8 Ad. & El. 109.

E. T. 1851. through the negligence of the men the tackle failed and the barrel
Queen's Bench fell and injured the plaintiff, and it was held the master-porter could
 M'KEON not be considered in the light of a bailee but of a servant, and that
 v. BOLTON. the party employing him was liable for any injury caused through
 his negligence or want of skill.

Adair replied, and cited *Reedie v. The London and North Western Railway Company (a)*, where a Company, empowered by Act of Parliament to construct a railway, contracted under seal with certain persons to make a portion of the line, and by the contract reserved to themselves the power of dismissing any of the contractors' workmen for incompetence. The workmen in constructing a bridge over a public highway negligently caused the death of a person passing beneath along the highway, by allowing a stone to fall on him, and it was held the Company were not liable in an action against them brought by the administratrix of the deceased, the Court there observing, "The wrongful act here could not, in any possible sense, be treated as a nuisance. It was one single act of negligence, and in such a case there is no principle for making any distinction by reason of the negligence having arisen in reference to real and not to personal property. If the defendants had employed a contractor, carrying on an independent business, to repair their engines and carriages, and the contractor's workmen had negligently caused a heavy piece of iron to fall on a bystander, it would appear a strange doctrine to hold that the defendants were responsible." That case must be considered as overruling *Bush v. Steinman*.

BLACKBURNE, C. J.

We think there ought to be a verdict entered for the plaintiff. The nature of the subject-matter of the contract in these cases makes all the difference; and when we look to the act done in the very house occupied by the plaintiff, and under his wife's directions, it appears to have been but the ordinary act of a servant.

(a) 4 Exch. 244.

MOORE, J.

The defendant had the selection of the person to remove this rubbish, and is therefore liable for the skill and care of the person so employed.

Rule absolute.*

* CRAMPTON, J., and PERRIN, J., *absentibus*.

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THE MIDLAND GREAT WESTERN RAILWAY
COMPANY OF IRELAND

v.

MICHAEL QUINN, Jun.

T. T. 1849.

May 25.

DEBT for Railway calls.—The declaration stated that on the 1st of November 1847, to wit, at &c., the defendant was and still is the holders of divers, to wit, forty shares in the capital of the Company, and then and there was and still is indebted to the Company in the sum of £800 in respect of four several calls of £5 each respectively upon each and every of the said forty shares, whereby an action hath accrued, &c.

The defendant pleaded by Michael Quinn, as his guardian, he being an infant—first, the general issue; secondly, *onerari non*; because he says, that he the said defendant, at the time of the making of the said supposed contract in the said declaration men-

To an action of debt for Railway calls the defendant pleaded that at the time of the making of the said supposed contract in the declaration mentioned he was an infant; *Held*, on special demurrer, that the plea was informal, no contract being stated in the declaration, and that consist-

ently with the language of the plea a case might exist in which the liability would not arise solely from contract.

To a second action for calls the defendant pleaded by his guardian that before the calls were made and before the registry of any person as a shareholder, the defendant had bought the shares from different persons; but before the defendant was registered as holder of them, and before the calls, an agreement was made between him and the plaintiffs, whereby, in consideration of his undertaking to pay all the calls, the plaintiffs promised to place his name on the register, and in pursuance of the agreement they did place his name on the register; that he was and is an infant, and that he has not at any time derived, nor does he seek to derive, any benefit or advantage from the shares; *Held*, on special demurrer, that the plea was bad in not showing an entire abandonment of all interest in the subject-matter of the contract.

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tioned, was an infant under the age of twenty-one years, to wit, of the age of nineteen years, to wit, &c.—*Verification.*

Replication—Joining issue on the first plea, and special demurrer on the second plea, assigning as cause that it is uncertain what contract is referred to by the plea, there being no contract mentioned in, or referred to, by the declaration; and also that the liability to payment of calls arose either at the time of the registration of shares, or at the time of making of the calls in the declaration mentioned, and that the plea should have averred the infancy of the defendant at one or other of such periods respectively. And that the plea was no answer to the action; and that by the provisions of the Companies Clauses Consolidation Act (1845) an infant shareholder was liable to calls made during his infancy, and that the plea was in other respects informal, &c.

Joinder in demurrer.

Boyce and Martley, for the demurrer.

It is laid down in *Dwarris on Statutes*, p. 516, that “a statute which gives corporal punishment does not bind an infant, *contra* “of other statutes, if they do not except infants.” 8 Vic. c. 16, s. 79 (Companies Clauses Act), expressly contemplates the case of minors being shareholders; for it provides that “if any shareholder “be a minor he may vote by his guardian or any one of his guar- “dians.” An infant assignee might not be liable on a contract as between him and the Company, though he would be as between the assignee and himself: *Billing v. Osbrey* (a); *Mahon v. O'Farrell* (b); *Evelyn v. Chichester* (c); *Kirton v. Elliott* (d); *Cork and Bandon Railway Company v. Cazenove* (e).—[CRAMPTON, J. There the defendant had attained age when the action was brought; here it does not appear that he has reached his majority.]—The plea should be taken most unfavourably for the pleader.

H. O'Hara (with him *J. Henn*), in support of the plea.

The defendant is sued under 8 & 9 Vic. c. 119 (local and personal),

(a) 1 Furl. L. & T. 114.

(b) 10 Ir. Law Rep. 527.

(c) 3 Bur. 1717.

(d) 2 Buls. 69.

(e) 11 Jur. 802.

and section 1 incorporates into it the 8 & 9 Vic. cc. 16, 18 and 20. The Companies Clauses Act makes no reservation in favour of infants, and their Common Law rights are still preserved. The shares are personal estate, and the section referred to as to a minor voting by guardian is only until he attain age. 8 Vic. c. 16, s. 19, provides for the case of the transmission of shares by marriage, or by will, or by intestacy, and these are the only instances the statute contemplates of exemption from the general rule: *Williams v. Moor* (a). The plea of infancy is a bar to any demand on a contract.—[PERRIN, J. Can an infant be an original shareholder?—BLACKBURN, C. J. The Companies Clauses Act recognizes the probability of an infant being a shareholder.]—An infant cannot sell and transfer his shares, and no section of the statute authorises an infant in so doing; but an infant may repudiate the contract when he comes of age. The 79th section of the Companies Clauses Act puts lunatics and idiots in the same position as infants; for it enacts, “if any shareholder be a lunatic or idiot, such lunatic or idiot may vote by his committee.” So that if shares could be assigned by these incapacitated persons, a lunatic or idiot might be sued. Lunacy is an answer to any action of contract, and it may be given in evidence under a plea of *non est factum*, which infancy could not: *Yates v. Bowen* (b). The present action is founded on a contract, and a person becomes a shareholder either by signing the subscription contract, which could be avoided afterwards by an infant, or by assignment, or by transmission, which are both matters of contract, and debt is the only action by which the calls may be recovered. Admittedly, where an infant becomes the assignee of a lease, he is liable on it, but the Court will not extend that doctrine to contracts: 1 *Roll. Abr. Infant*, K; *Ketsey's case* (c). A lease to an infant is not void, but voidable only: *Lowe v. Griffith* (d); *Com. Dig. Infant*, C, 2.—“A contract by an infant, if it be not for necessaries, shall be void:” *Hallet v. Parsons* (e).

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(a) 11 M. & W. 256.

(b) 2 Stra. 1104.

(c) Cro. Jac. 320.

(d) 1 Scott, 458.

(e) 3 Bur. 1805.

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In 2 *Inst.*, p. 673, it is said if an infant bargain and sell lands, which are in the realty by deed indented and enrolled, he may avoid it when he will: *Gibbs v. Merrill* (a). It is for the plaintiff to prove that the infant has avoided his promise. An infant may therefore avoid the deed by pleading his minority, and so we have done here: *Williams v. Moor*; and the general words in the 8 *Vic. c. 16* cannot contravene the usual rule of law as to the non-liability of an infant on a contract.

Martley replied.

There may be a shareholder independent of any contract; and as no contract is averred in this declaration, for the transmission of shares may be without any contract, the plea must be overruled and the demurrer allowed, for the plea avers a contract, of which the declaration takes no notice. If the defendant's argument were right, the 79th section of 8 *Vic. c. 16* would be nugatory; that provides for the exercise of their rights by minors; and is it to be said that if a minor be beneficially entitled to a share he is to be discharged of his liability if the contract be not a profitable one? This action is founded on a legal liability, not on a contract. A minor is liable for a *tort*, he is liable in an action of detinue, and on all legal liabilities. These legal liabilities do not depend on contracts. If an infant be not liable, the plea should have stated how he was not liable; for we could not take issue on the plea as it now stands. The registration of an infant shareholder is a valid registration, and the Company could not refuse to register him.

Cur. ad. vult.

May 29.

BLACKBURN, C. J., delivered judgment.

On the argument of this case many very important questions have been discussed on which we do not mean to intimate any opinion, ~~nor~~ allow the demurrer to the plea on the mere ground of

(a) 3 Taunt. 307.

its informality, in alleging that the defendant was an infant when the contract in the declaration was supposed to have been made. No contract is stated in the declaration, and though the liability of a shareholder must be made out through the medium of a contract, yet a case may be put—for instance, that of the marriage of a female shareholder to an infant, in which, strictly speaking, the liability would not arise solely or directly from contract. The possibility of such a case shows that the plea is either too vague, or leaves a case, or class of possible cases, in which, consistently with the language in the plea, the defendant might be liable.

Allowing the demurrer, we give the defendant, who appears to be an infant on the record, leave to amend.

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In pursuance of the leave so given, the defendant, by his guardian, again pleaded the general issue, and this plea :—

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May 9.

Onerari non, because he says that before the making of the said calls, &c., and before any person had been registered as the holder of the said shares in the declaration mentioned, or any of them, to wit, &c., the defendant had bought the several shares for divers large sums of money then and there paid to divers persons claiming to be entitled to said shares, that is to say, a certain large sum, to wit the sum of £4 for and in respect of each of said shares, making in all the sum of £160; and the defendant saith that afterwards, and before the said call was made, and before any person or persons were or was registered as the holder of said shares, or any of them, to wit, &c., an agreement was made and entered into between the plaintiffs and defendant, whereby in consideration that defendant would undertake and agree to pay all calls that should thereafter be made in respect of the said shares in the said declaration mentioned, and of every of them, the plaintiffs undertook and promised the defendant to place the name of the defendant on the register of the shareholders of said Company; and the defendant further avers that in pursuance of said agreement the plaintiffs afterwards, to wit, &c., did place on the register of shareholders of said Company the name of the defendant as

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the holder of said shares, &c., and that before and at the time that defendant bought said shares and every of them, and before and at the time of the making said agreement between plaintiffs and defendant, and before and at the time that defendant's name was so placed on the register of shareholders of said Company, and before and at the time of making the call in the declaration mentioned, the defendant was and still is an infant under the age of twenty-one years, to wit, of the age of nineteen years, to wit, &c. And the defendant further avers that he has not at any time derived, and does not seek or claim to derive, any profit, benefit, or advantage whatsoever from the said shares or any of them, or by reason of his being such registered shareholder as aforesaid.—*Verification.*

A second action was brought against the defendant for other calls, and he pleaded the same pleas, except that in the second plea in the second action he omitted the averment as to his deriving or claiming any profit from the shares. Issue was joined on the plea of *nil debet*, and a special demurrer taken to the second plea, assigning as cause that though it appeared by the plea that the defendant acquired an interest in the shares sufficient to make, and which in law did make, him a shareholder, until avoidance of the agreement by his disclaiming the same, yet it did not appear by the plea that the defendant ever repudiated or disclaimed the same, or that any notice of such disclaimer or repudiation was given to the plaintiffs, or that any notice that the defendant held the shares at the disposal of the plaintiffs was ever served on them; and that it did not appear that the agreement was disadvantageous to the defendant, or that the shares are or would hereafter be unprofitable to the defendant, or that he would not at some future time claim a benefit or advantage in respect of them, and that the pleas, though professing to confess the cause of action in the declaration, did not avoid the same by any sufficient matter, and furnished no answer to the action, or displace the defendant's liability.

Joinder in demurrer.

R. Armstrong (with him *Martley*), for the demurrer.

The case opened on this plea is one of contract; and the question

for the Court is, has the defendant shown any thing on his plea to avoid the contract at the time of his entering into it? *The Cork and Bandon Railway Company v. Cazenove* (a). Infancy is no answer to an action for calls. If an infant become the holder of shares by contract, he cannot get rid of that liability except by repudiation of them, and notice of that to the Company: *The Great Western Railway Company v. M'Mahon* (b); *The Newry and Enniskillen Railway Company v. Coombe* (c). The plea states the shares were of no advantage to the defendant; it does not go on to say that at a future time he would not seek advantage from them. It is not a repudiation to say that at present they are not of advantage to him.—[PERRIN, J. Can an infant elect and repudiate?—He can. In *The Leeds and Thirsk Railway Company v. Fearnley* (d), Parke, B., says:—"This is not the ordinary case of a contract by an infant, but a purchase of shares, by which he acquired a pro-perty in the possible profits of the concern. Now, according to *Ketsey's case*, and what is more distinctly laid down by Dodderidge, J., in *Kirton v. Elliott*, he would be liable, unless he repudiated; then ought not the plea to aver that fact?" If any reliance could be placed on the averment of absence of profit to the defendant, the plea is defective in not alleging that he does not hereafter expect to derive any.

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H. O'Hara (with him *Fitzgibbon*), contra.

The pleas are put in by the guardian of the minor, and are to the effect that the defendant was, and still is, an infant. We say a minor can bind himself for nothing but necessities. A minor may become liable for calls by devolution, by marriage, or by contract.—[BLACKBURN, C. J. That was the ground of our decision on the former argument; but the defendant might have become liable in some of these ways, and that therefore the plea of infancy generally was bad.]—The cases in England were against the minor after he attained age, and go on the analogy to the cases decided on real property where it is for the benefit of the infant to hold the land and receive

(a) 10 Q. B. 935.

(b) 5 Exch. 114.

(c) 3 Exch. 565.

(d) 4 Exch. 30.

E. T. 1851. *Queen's Bench* the profits: *Bligh v. Brett* (a). The defendant in his plea does not say he repudiates; for how can an infant repudiate? If an infant apply for scrip to a Company, the Company may refuse to give it. This is a voidable contract.—[PERRIN, J. His plea in effect states a contract, and he relies on it. He pleads a contract, and then he says he was an infant when it was made.—BLACKBURN, C. J. It amounts to an averment of property actually vested in him, and there is no repudiation of that property.]—It but amounts to saying there was an agreement between him and the Company, and there is no possession of property at all, nothing but a right to call on the Company to share the profits if there be any, and a right on the part of the Company to call on him to share the losses if there be such. There is no property of which a person can have any manual possession.—[PERRIN, J. Suppose the contract was a profitable one, and the infant received dividends?—It would then be nearer the case of a minor obtaining a lease and going into possession of the profits of the land. But this is the case of a Company registering an infant on a contract which he had no power to enter into; and the Court ought to be satisfied that the law is clear and distinct on the point before they deprive the defendant of his Common Law rights.

Martley replied.

The mere plea of infancy is taken away by the Railway Acts, and all the arguments as to the mischief of allowing an infant to contract are beside the present question. The plea is of a purchase from a shareholder, and that defendant hereby acquired the shares. The 8th section of the Companies Clauses Act says:—"Every person "who shall have subscribed the prescribed sum or upwards to the "capital of the Company, *or shall otherwise* have become entitled "to a share in the Company, and whose name shall have been "entered on the register of shareholders hereinafter mentioned, shall "be deemed a shareholder." The contract set out on this plea is a *nudum pactum*, and then the plea becomes one of infancy merely, and is ruled by the former decision in the case. In the case of *The Cork and Bandon Railway v. Cazenove* there was an averment that

(a) 2 Y. & Col. Exch. 268.

since the defendant came of age he had not ratified the agreement or contract. In any case the defendant should show he had repudiated the shares.

Cur. ad. vult.

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BLACKBURN, C. J., delivered judgment.

In both these cases the plaintiffs sue for calls alleged to be due by the defendant as a holder of shares. The declarations are in the common form; the defendant by his guardian has pleaded several pleas, and in each case the plaintiffs have demurred to the second plea. In one of them it is alleged that before the making of the calls, and before any person had been registered as a holder of shares he had bought from different persons for certain sums of money several shares; that before he or any one was registered as holder of those shares, and before the calls, an agreement was made by him with the plaintiffs; in consideration of his undertaking to pay all calls to be made on those shares, the plaintiffs promised to place his name on the register of shareholders, and that in pursuance of this agreement, the plaintiffs did place his name on the register, and he avers that he was and is an infant, and that he has not at any time derived, or does not seek to derive, any benefit or advantage from these shares, or any of them.

May 10.

The second plea in the other case is similar, except that it omits the last averment which I have just stated.

The questions which arise here are—first, is an infant liable to be sued on such a contract? of this the authorities leave no doubt; for though the position of Lord Denman and Patteson, J., in the case of *The Cork and Bandon Railway Company v. Cazenove* must be taken with some qualification, it is plain from all the authorities cited, and this Court has itself decided, that the plea of infancy in the common form is not an answer to an action against a shareholder for calls; but though an infant is so far liable, it is plain that he may avoid his contract either before or after he is of age by repudiating the shares. This is expressly decided in *The Newry and Enniskillen Railway Company v. Coombe*; but if he would

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avoid it, he must do so by so pleading as to show an entire abandonment of all interest in the subject-matter of it. Nothing can be more obviously just or reasonable than to require him to do this; for whilst his name remains on the register he has an indisputable legal right to share in the profits of the very undertaking which, as far as in him lies, he frustrates by refusing the contribution to the fund by which alone can such profits be realised. The question whether either of these pleas amounts to a repudiation admits of no doubt. In one there is a total absence of any such averment; in the other the averment is that the defendant has not, and does not, claim any benefit from the shares; but of this no notice to the Company is averred; besides which it is so partial and evasive, that the Company could not possibly act on it by making any disposition of the defendant's shares. He was bound unequivocally to renounce his right, the retention of which must be prejudicial to the rights of the Company and of all its members.

Demurrer allowed.

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Queen's Bench

THE TRUSTEES OF EVANS'S CHARITIES

v.

THE GOVERNOR AND COMPANY OF THE BANK OF
IRELAND.

April 18.

NAPIER (with him *W. F. Darley*), on behalf of the defendants, moved that the officer of this Court be directed (in case the judgment shall not have been made up) to include therein the several proceedings as they stand of record on the files of the Court, and that such record, judgment and enrolment shall comprise the pleadings up to the first trial, the bill of exceptions taken by the plaintiffs to the charge of the LORD CHIEF JUSTICE at the first trial, and the judgment of the Court thereon ordering a *venire de novo*, and the verdict and judgment thereon.

A motion to include several proceedings in a record before the judgment is made up is premature, and will not be granted.

This case had been tried twice; a verdict was had on the first trial in favour of the defendants. On that trial Counsel for the plaintiffs excepted to the charge of the CHIEF JUSTICE, and the exceptions were allowed on argument (a), and the Court thereupon awarded a *venire de novo*. On the award of this *venire* the case was again brought to trial, and the defendants not appearing, a verdict was entered against them by default. The defendants allowed judgment to go by default, in order that final judgment should be entered on the record, as they intended to bring a writ of error, and until final judgment be entered no writ of error could be brought; so it had been decided in the case of *Kennedy v. Gregg* (b). A similar course was adopted in the case of *Howard v. Shaw*, where a *venire de novo* was awarded by the Court (c). We are informed that it is the practice in this Court, when making up the record, to omit all the documents touching the bill of exceptions, and unless these be included in the writ of error, there will be no

(a) 12 Ir. Law Rep. 365.

(b) 10 Ir. Law Rep. 558.

(c) 9 Ir. Law Rep. 354.

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means of revising the judgment of this Court if it be erroneous. The practice so adopted is clearly bad, as the bill of exceptions becomes part of the *postea*, and ought to be made part of the record. In England the practice is to tack the bill of exceptions to the record; but here it is embodied into the *postea*.

BLACKBURN, C. J.—What right have you to call on us to make this order? You are assuming that the record will not be properly made up.

Hans Hamilton and Macdonogh, contra.

BLACKBURN, C. J.

Whatever be the merits of this case, we cannot now enter into them. If the record be not properly made up, there are means by which that defect may be remedied; but this application is altogether premature; *non constat* that the plaintiff will ever proceed to execution; and how can we compel a plaintiff to make up a judgment he may never take any proceedings on? This motion being therefore premature, we say—

No rule.

April 26.

Where there is an allegation of diminution in a record on which a writ of error is about being brought, the proper course is to issue the writ of error and obtain a *certiorari* to return the record, and on return thereof to allege diminution if the part sought to be inserted be omitted.

GREENE renewed the above motion.

Our former application was refused on the ground of being premature; but the officer has since served us with notice that he will not insert this bill of exceptions; we therefore are driven to make this application to the Court.—[BLACKBURN, C. J. Have you not the power to allege diminution? If so, how can you call on us to interfere?—PERRIN, J. If we make the order you ask for, we would conclude the parties; the proper course would be to sue out a writ of error; and if the documents be not returned to the

Court of Error, to issue a *certiorari*.]—That course might be adopted, but it would only cause unnecessary delay and expense.—[CRAMPTON, J. If it ought to be part of the record, it is clearly the subject-matter for alleging diminution.]—If on a *certiorari* and allegation of diminution the Court return the record without incorporating the bill of exceptions therein, we could not have a writ of error thereon. The bill of exceptions is made part of the record by the 28 G. 3, c. 31, and an award of a *venire de novo* having been made by this Court, we are entitled to question the validity of this award by writ of error. If we had appeared at the second trial it would have caused unnecessary expense, as we contended the rulings of the CHIEF JUSTICE on the first trial were correct. The Court of Error will not inquire into the propriety of this rule: *Gully v. The Bishop of Exeter* (a); *How. Exch. Pr.* p. 336; *Tidd's Pr.* p. 14, 9th ed.; 8 *Coke*, 162, a.

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Hans Hamilton and Macdonogh, contra.

This motion cannot be supported; the officer has no power to make the amendment sought. The proper course is to issue a writ of error; and if these matters be not returned on the record, to allege diminution: *Newton v. Boodle and others* (b).

BLACKBURNE, C. J.

This is not an application to amend the record, nor is it an application the refusal of which may screen this Court from a revision of its judgment, but it is to ascertain if the officer is about to omit that which is alleged to be part of the record. If he omits that, then the application, on diminution being alleged, should be for a *certiorari*. We do no prejudice to the defendants by refusing this application; for if the matters suggested be part of the record, they can have them upon *certiorari*; but the Court pronounces no opinion whether they be part of the record or not. We therefore refuse the motion, with costs.

(a) 5 *Man. & Ry.* 457, and note.

(b) 18 *Law Jour. N. S.*, C. P. 72.

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Exch. Cham.

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Final judgment having been entered for the plaintiffs on the verdict found in their favour on the second trial, the defendants issued a writ of error. The transcript of the record was thereupon returned to the Court of Exchequer Chamber, omitting the bill of exceptions taken on the first trial, and the judgment given thereon by the Court below. To this writ of error the defendants below (the plaintiffs in error) assigned as cause of error that there was diminution—that the record was defective in not having incorporated therein the bill of exceptions, and other proceedings on the first trial had in this cause.

Nov. 7, 8.

Where a trial was had and a bill of exceptions taken to the charge of the Judge, which exceptions were allowed, and a *venire de novo* awarded, and a second trial had, and a verdict found in favour of the defendants; on a writ of error issued, these proceedings were omitted on the record; *Held*, that the plaintiff in error was entitled to a *certiorari*, to have these matters returned as part of the record.

GREENE (with him *Brewster* and *W. F. Darley*), for the plaintiffs in error, moved the Court, pursuant to notice, for a writ of *certiorari*, to be directed to the Chief Justice of the Court of Queen's Bench, directing that Court to transmit into this Court the entire of the record, process and proceedings in this cause, comprising the Nisi Prius record brought down to the first trial in this cause, and the bill of exceptions taken by the defendants in error to the charge of the learned Chief Justice, who presided as Judge at the said first trial, the order or award of *venire de novo*, and also all other matters touching said record, process and proceedings, which remain in the said Court of Queen's Bench; and for an order directing the proper officer of the Court of Queen's Bench to certify to this Court the entire of the record, process and proceedings in the cause comprising the said first Nisi Prius record and said bill of exceptions, and also all other matters touching said record, process and proceedings.

This motion is grounded on an assignment of error, alleging diminution. The question is, whether the omitted part should form part of the record? in other words, whether there shall be a bill of exceptions or a writ of error? that is, whether it shall be in the power of the officer of the Court of Queen's Bench to repeal an Act of Parliament, and deprive the suitor of his right to reverse an erroneous judgment? The general rule is, that a writ of error lies upon a judgment in any way founded upon a mistake of the law,

whether in the judgment itself, or in any of the proceedings prior to it. The writ of error cannot be brought until after final judgment; but then it will lie to correct antecedent error. A judgment regular on the face of it may be illegal and erroneous, because founded on something which does not warrant that judgment: *Co. Lit.* p. 288, *b*: "Writ of error lieth where a man is grieved by an error in the foundation, proceeding, judgment, or execution, and therefore it is called "*breve de errore corrigendo* ; but without a judgment, or an award "in the nature of a judgment, no writ of error doth lie." But no writ of error can be brought except for matter appearing on the record; and as the proceedings at Nisi Prius did not at Common Law so appear, there was no mode of correcting the error of a Judge at Nisi Prius; this led accordingly to the enactment of the Statute of Westminster the Second, 13 *Edw.* 1, c. 31, the effect of which was to make the matter contained in the bill of exceptions part of the record. If once a part of the record, it can never cease to be so; no officer, not even the Court itself, can expunge it; to do so, would be to mutilate and falsify the record; it is an integral part of it: 2 *Inst.* p. 426; *Raymond on Exceptions*, p. 14. The remedy provided by this statute is not confined to error in directing a jury: *Strother v. Hutchinson (a)*, but extends to any directions in the course of a cause: *Raym.* p. 29. This statute has been liberally construed, Courts being always anxious to afford means of having their errors rectified. In the present case it is clear that the award of a *venire de novo*, that is, the overruling the decision of the Judge at Nisi Prius, must be capable of revision. If the Court was wrong, then the final judgment grounded upon that mistake of the Court was erroneous, because, as Lord Coke says, there is error in the foundation of the judgment. If the Court were wrong in granting a *venire de novo*, the second trial was a nullity; the judgment should have been according to the first verdict, and not according to the second. Now, however, the first verdict does not appear at all, nor any proceeding intervening between the first *venire* and the second verdict, that is to say, the Court has erred in point of law, and by its own act, or the act of its officer, has precluded

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(a) 4 Bing. N. C. 90.

M. T. 1849. the injured party from having its decision reviewed: 2 *Inst. Exch. Cham.* p. 428. If a *venire de novo* be improperly awarded, it is ground of error: *Lewis d. Earl of Derby v. Witham* (a); *Loveday's case* (b); *Corner v. Shew* (c); *Hodgson v. Repton* (d); *Campbell v. The Queen* (e). The moment therefore the *venire de novo* was awarded, the defendants had an inchoate right to correct it by writ of error, for no writ of error can issue until final judgment: *Kennedy v. Gregg*. Accordingly in this case the proceedings were necessarily continued to the second trial and judgment entered; then we bring our writ of error, and we are told that the very thing which was indispensable to entitle us to our writ of error is to take away our right, because the officer chooses to substitute a record containing the subsequent proceeding only for the record which contained the erroneous proceeding; in other words, the Court says to the suitor, after pronouncing an erroneous judgment, "you cannot review this now, because there is no final judgment," and afterwards, when final judgment is given, "you cannot review our error now, because what was erroneous shall not form part of the record." Two things are confounded, which are in their nature, their history and their legal consequences totally and essentially distinct, viz., a second trial under an order of the Court on motion commonly called a new trial, and a judgment or award of a *venire de novo*. In the first case the practice is not to notice the first verdict on the record, because the motion is founded upon affidavits which never appear on the record. If therefore the first verdict was to appear, nothing would be stated on the record to justify a second *venire* or trial, and the whole record would be irregular; and if the second verdict differed from the first, all would be erroneous, because the different parts of the record would be contradictory. An order for a new trial is an innovation on the Common Law, and was introduced in lieu of the old process of attain: *Bayly v. Boorne* (f); *Wood v. Gunston* (g). It is a creature of the Court and matter of discretion. On the other hand, a *venire de novo*

(a) 2 Stra. 1185.

(b) 8 Rep. 65, b.

(c) 4 M. & W. 167.

(d) 7 Q. B. 84, 101.

(e) 11 Q. B. 799.

(f) 1 Stra. 392.

(g) Sty. 466.

is coeval with the Common Law, and is a matter of right and not of discretion; it was awarded in every case where it appeared from the record that the verdict was irregular or imperfect: *Dod v. Eaton* (a); *Ratcliff v. Dudeney* (b); *Pendarvis v. Dawkes* (c); *Theoballs v. Newton* (d); 2 *Lilly's Prac. Reg.* p. 778; *Bird v. Appleton* (e). It is grounded upon something appearing upon the record, and it is imperative on the Court to grant or refuse it: *Davies v. Pearce* (f). So in criminal cases there can be no new trial in treason or felony, though there may be in misdemeanour; but if there be a mistrial or an imperfect trial, there may be a *venire de novo*: 1 *Chitty's Cr. Law*, p. 654; *Grady and Scot's Cr. Prac.* p. 140. Further, it may be awarded by a Court of Error: *Grant v. Astle* (g); *Wells v. Parker* (h); *Lickbarron v. Mason* (i); *Lucena v. Crawford* (k); *Doe v. Huthwaite* (l); but it is plain that a Court of Error cannot grant a new trial: *Haswell v. Chalie* (m). The distinction then is, that there may be an appeal from an award of a *venire de novo*, but not from a rule for a new trial.

The next point then is that the bill of exceptions ought to appear on the record; in fact, the whole of the proceedings have been irregular. Whenever any proceeding once becomes parcel of the record it must always be stated: *Doberteen v. Chancellor* (n). Therefore the bill of exceptions, once returned to the Court above on the first *postea*, becomes part of the *postea*; such would be the case in England, and, *a fortiori*, it is so here. In England the case goes at once to the Court of Error, the judgment is given, and the bill of exceptions is annexed to it, and is removed with it by the writ of error: *Gardner v. Baillie* (o); *Davies v. Lowndes* (p). That case shows that the bill of exceptions is a proper subject for the consideration of a Court of Error, and as they can only decide upon what

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(a) Sty. 63.

(c) *Ibid.* 205.

(e) 1 *East*, 109.

(g) *Doug.* 731.

(i) 5 *T. R.* 367.

(l) 3 *B. & Al.* 642.

(n) 1 *Lord Raym.* 329.

(b) Sty. 176.

(d) *Ibid.* 307.

(f) 2 *T. R.* 126, note a.

(h) 1 *T. R.* 40, 783.

(k) 2 *N. R.* 328.

(m) 2 *Stra.* 1124.

(o) 1 *B. & P.* 32.

(p) 1 *Scott, N. P.* 337.

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appears on the record, it follows that the bill of exceptions is part of the record: *Dillon v. Parker* (a). In that case a party brought his writ of error before he had got the bill of exceptions sealed, and there was a motion that the party should attend the Judge to settle the exceptions; this was refused, two of the Courts saying that the application might be made to the Court of King's Bench, and if that Court made the order, the bill of exceptions might be brought up by an allegation of diminution: *Bust v. Baker* (b). There a bill of exceptions in the Common Pleas was removed by writ of error to the King's Bench, which Court awarded a *venire de novo* returnable there. It is clear if there had been a writ of error on that judgment to the House of Lords, the bill of exceptions would have formed part of the record, and, *a fortiori*, it is so in this country; for the bill of exceptions is not merely annexed to the record, but is actually incorporated into the *postea*. By returning the *venire* to the King's Bench, it showed that the record belonged to that Court, and also that the second trial was distinct from the first—not a substitution for it, but superinduced upon it; every portion of the second trial would be *coram non JUDGE* if that award of a *venire de novo* was erroneous. In Ireland, before the passing of the 28 G. 3, c. 31, the law was the same: *Davenport v. Tyrrel* (c). Although the statute in Ireland has authorised the Court to adjudicate, it does not make the Court below a Court of Error, but it is a statutable authority authorising them to decide upon the first judgment, but leaving that judgment open to revision, otherwise the bill of exceptions is useless: *Porter v. Agar* (d). *Searle v. Lord Barrington* (e), and *Fitz. N. B.* p. 21, show that the sealing of the bill of exceptions makes it part of the record; and 11 Hen. 4, c. 52, shows that it is no part of the record before it is acknowledged.

As to the effect of 28 G. 3, c. 31, *Trimleston v. Kemmis* (f) shows that the bill of exceptions is essentially part of the record. In an Inferior Court there is no power to grant a new trial, but it

(a) 11 Price, 100.

(c) 1 Wm. Blac. R. 675.

(e) 2 Stra. 826.



(b) 3 T. R. 36.

(d) 2 Buls. 119.

(f) 9 Cl. & Fin. 772.

has power to award a *venire de novo*, and accordingly both verdicts appear: *Cole v. Greene* (a); *Rose v. Fowler* (b).

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If then the bill of exceptions be properly part of the record, the party aggrieved by the omission may allege diminution, and is entitled to a *certiorari*. Diminution is to be alleged on the record: 1 *Roll. Abr.* p. 764; *Fitz. N. B.* p. 25; *Coke's Entries*, pp. 242, 252; *Clift's Entries*, pp. 325, 328; *Rastell's Entries*, p. 290; *Lilly's Prac. Reg.* p. 365; *Lilly's Entries*, pp. 226, 253, 365.

There are certain mistakes which a Court of Error has not jurisdiction to correct. The distinction is shown in *Mellish v. Richardson* (c); *Bishop of Exeter v. Gully* (d); *Gould v. Oliver* (e).

Macdonogh and Hamilton, contra.

It is contended on the other side that if the practice of the Court of Queen's Bench be right, where the Court errs in pronouncing an opinion on a bill of exceptions in favour of the exceptant, that error is irremediable. That does not follow. The party who excepts, if the judgment be adverse to him, may bring the writ of error, for there is a verdict and a judgment; but he should appear upon the second trial; and as the Judge will of course give his opinion in accordance with the ruling of the Court, the party dissatisfied can take his bill of exceptions. The act of granting a *venire de novo*, which is a mere order of the Court, is not examinable; but the grounds of that order are examinable so soon as they become the foundation of a final judgment. If the argument on the other side be right, the party is to go down to trial and obtain a judgment in order that his adversary may render that nugatory, not by coming forward and taking his exceptions, but by relying on an antecedent verdict; in short, if there were six *venires*, the party may resort back to the first, or any intermediate one, and derive advantage, not from his own bill of exceptions, but his adversary's. Suppose that on the second trial a quantity of new evidence is given, clearly

(a) 1 Lev. 309; S. C. 2 Saund. 253.

(b) 4 B. & A. 273.

(c) 1 Cl. & Fin. 224.

(d) 5 M. & Ry. 499.

(e) 2 M. & Gr. 238.

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evinced the right to have a verdict, then, according to the argument on the other side, the Court would bind the parties to the former finding, whereas, if our argument be well founded, if new evidence be given, justice is done, and the party has no right of complaint. They seek to have two conflicting verdicts sent to the Court of Error; no such record could exist in England on bill of exceptions. The principle of law is, that there should be uniformity in records, one verdict followed by one judgment. The 28 G. 3, a beneficial and remedial statute, passed with the avowed object of relieving the party excepting from delay and expense, has not had the effect of rendering it necessary to have two verdicts on record in one and the same recorded judgment. The Court in which the suit is, is not made a Court of Error, for there is no judgment to be examined, it is merely to inquire whether it will allow a judgment to pass upon the verdict, and the cause is not ripe for a Court of Error until there be one verdict, and one only, on which the Court permits the judgment to be entered. It is admitted that the case of *Kennedy v. Gregg* is rightly decided, and that the award of a *venire de novo* by the Court in which the suit is, is but interlocutory; but it is said that though in this stage of the cause a writ of error would not lie, yet it would after a new verdict and new judgment, if both verdicts be expanded on the record; this is altogether a mistake; there is nothing to question the propriety of the order granting the *venire de novo*. The practice is reported for upwards of forty years uniformly to have been to enter a continuance of *vicecomes non misit breve*. Now there are two rolls, the issue roll and the Nisi Prius roll; if the record be made up as they desire it, it will be directly contrary to this established practice of the Court in entering this continuance. The bill of exceptions is not *per se* a part of the record; it becomes so when the party excepting fastens it to the record. The allegation of diminution here is incorrect, as it cannot be alleged contrary to the record: *Tyon v. Keller* (a); *Roe v. Power* (b). The award of the *venire de novo* has the effect of blotting out the first trial altogether, as the party taking exceptions is alone entitled to the benefit of them. At Common Law, if the jury appeared on

(a) 1 Salk. 268

(b) 3 Bac. Abr. 77.

the trial, and if there was no imperfection on the record, there could be no new *venire*, and to remedy that the statute 28 G. 3, c. 31, was passed. That statute is to be read in connection with the 29 G. 2, c. 6 (the Jury Act). The 10th section of this latter Act provides, that if the case shall not be tried on the first *venire* issued, the plaintiff is to issue a new *venire*, and proceed to trial thereon as if no former writ of *venire* had been prosecuted or filed in the cause, showing that the first *venire* is to be treated as a nullity.

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Brewster replied.

BLACKBURN, C. J.

This is a motion by the plaintiffs in error, who were defendants below, to have a *certiorari* to bring into this Court a bill of exceptions, *postea* and verdict upon a trial in this cause, in which trial a verdict was had for the defendant below, and on which verdict no judgment was had, the Court having allowed the exceptions, and awarded a *venire de novo*.

The record before us takes no notice of the former trial, verdict, or bill of exceptions; and unless this motion be granted, there will be no means or power of considering whether the award of the *venire* was right or wrong. The record in its present form is stated to be according to the usual practice in the Court below. It is exactly in the same form as if the *venire de novo* had been made on a motion for a new trial.

It has been contended by the Counsel in support of this motion that this practice is wrong, and that where, as in this case, a *venire de novo* is granted for matter apparent on the record, that the award of it is, after final judgment, examinable on writs of error, and that if erroneous, it ought to be reversed, and the proper judgment pronounced. We think the able and learned argument of Mr. *Greene*, and the authorities he has cited, preclude all doubt on the subject, and that the award of a *venire* on the bill of exceptions, which by the Act of Parliament is incorporated in, and made a part of, the *postea*, is founded on matter of record, and that diminution being alleged, the *certiorari* should issue to bring before us that matter,

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that we may examine whether, in this respect, the findings below and judgment thereon are or are not erroneous.

The argument addressed to us by the Counsel for the defendant in error is, that the order for a *venire de novo* is like an order on motion to the discretion of the Court for a new trial. I cannot accede to this; on the contrary, the judgment the Court is to pronounce is to be founded on matters of record alone; as Chief Justice Tyndal says, the words "to order judgment to be arrested" mean, in case any matter appear on the record of the action which calls upon the Court so to do. The words "to grant a *venire de novo*" mean the ordinary judgment when the exceptions are allowed, and the words "or otherwise as shall be agreeable to justice" mean, that the Court shall make any other order which the consideration of the bill of exceptions, as a bill of exceptions, calls on them by law to make. It is to be observed that before 28 G. 3 the matter of bills of exceptions was only examinable after judgment and by way of error, and there can be no doubt that there might have been a *venire de novo*; and if there had, it would have been as at Common Law, and the party to whose prejudice it was awarded, whether it was to reverse or affirm, might have had a writ of error. What then was the alteration of the law this Act made? It was simply to make examinable after verdict the same matters of law which had theretofore been examinable and remediable after judgment. It is impossible, with regard to this alteration and its object, to say that the order for a *venire de novo* was to become a matter of equitable discretion, and not, as it had been before, the right of the party excepting.

Let the writ of *certiorari* issue as applied for in plaintiffs' notice.

On the 23rd of November, in pursuance of such *certiorari*, the Master of the Court of Queen's Bench returned into this Court the documents required by the notice of the 7th of November.

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 Feb. 1.

Greene moved, pursuant to notice, that the transcript of the record heretofore certified in this cause into this Court be sent back

to the Court of Queen's Bench to be amended according to the record, as certified by the Chief Justice upon his return to the writ of *certiorari*, which issued in the cause, and accordingly that the proper officer of the said Court of Queen's Bench do include in such amended transcript the first Nisi Prius record, or issue of Nisi Prius in this cause, together with the verdict of the jury and the bill of exceptions taken by the defendant in error to the charge of the learned Chief Justice who presided at the first trial of this cause, and the judgment or order of the Court of Queen's Bench for a new trial; and that if necessary, in order to enable such officer of the Court of Queen's Bench so to amend said transcript, that the said record, as certified by the said Chief Justice upon the return to said writ of *certiorari*, be also sent back to the said Court of Queen's Bench; and that immediately upon such transcript of the record being so amended, then that the Chief Justice do forthwith certify and send back to this Court such amended transcript.

A similar course to the present was adopted in the case of *Lawson in Error v. Molony (a)*. In that case a writ of error was brought by the defendant on a judgment of Queen's Bench in June 1811, in a cause where John Jones, Lessee of William Molony, was plaintiff, and Elizabeth Lawson defendant, returnable in November 1811, to the Exchequer Chamber. The return by Downes, C. J., set forth a record of Hilary Term 1806, an award of a *venire facias* in Easter Term, and continuances by *vicecomes non misit breve* until Hilary Term 1810, when the record shows an amendment, whereby a suggestion is entered stating that the ground in question was claimed by Molony as lessee of the Corporation of Dublin, and that the Sheriff and coroners were part of the Corporation, and that the action was to try the title of the Corporation to the premises, and that plaintiff prayed a writ of *Elizors*, who returned *non misit breve* and continuance thereon until Trinity Term, when a suggestion is entered, for a change of venue to the County of Dublin, and continuances until the 17th of November 1810. Here ends the amendment; then follows a verdict for the plaintiff and judgment on the 26th of June 1811. This record is indorsed as amended by the orders of

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(a) MSS. Ex. Ch., M. T. 1815.

H. T. 1850. *Exch. Cham.* the 23rd of May and the 26th of November 1814 in King's Bench. It then assigns errors that the record had been materially altered in 1814 by these insertions, and alleged diminution, prayed for a *certiorari*, which was accordingly granted. The transcript of the record having been returned to the Court in 1815, a motion was made on behalf of the plaintiff in error, that it be sent back to the Court of King's Bench to be amended according to the record certified by the Chief Justice on the writ of *certiorari*, and it was ordered that the transcript be returned to be amended; accordingly the judgment was affirmed. That case shows that the proper course is to return the original record, and then amend the transcript. We have now a transcript of the judgment made up imperfectly, and the original of the documents returned by the *certiorari*, and the regular course is to send back the record to have these documents embodied in the transcript: *Tidd Prac.* p. 714.

Hamilton, contra.

We do not admit there is an imperfect record in the Queen's Bench; the transcript is not imperfect, and their notice shows that, for it does not allege any command, for no command could be made except the record were imperfect.—[BLACKBURNE, C. J. We granted the *certiorari* upon the very ground that the record below was imperfect]—The *certiorari* was to produce other documents, the production of which they allege would show error. These are produced, and the question now is, whether these documents are to be embodied in the record? What has been done is correct, and nothing further can be done, as it is impossible to alter the record of the Court below. It would be contrary to all principle to alter a transcript so as to make it vary from the record in the Court below, and it is a fallacy to say that the *Nisi Prius* record is part of the judgment.—[BLACKBURNE, C. J. When the transcript goes to an Inferior Court along with the exceptions and *venire de novo* it will be in the power of the Court below to make it conformable so as to answer the ends of justice. What they now seek would be necessarily preliminary to that. Suppose they assigned as error that it appeared by the record sent up that there was a trial and a *venire*

de novo thereon, and that consequently the transcript was not true, and that consequently the judgment should be reversed?—[PERRIN, J. We will not decide whether the Queen's Bench has power to alter its records.]—*King v. The Queen (a)*.

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Brewster, in reply.

Our writ of error should be allowed, it now appearing on the *certiorari* that there exists diminution. If the argument on the other side be correct, if this occurred by mistake, there being a perfect record, it could not be amended.

BLACKBURN, C. J.

It is impossible to make the amendment sought in this Court. We will send back the transcript and the writ of error, and the Court of Queen's Bench will do what they think fit.

Let the transcript of the record, together with the *Nisi Prius* record and bill of exceptions (returned into this Court with the *certiorari*), be sent back to the Court of Queen's Bench.

Martley moved on behalf of the defendants in error that said order of the 1st of February last be rescinded, and that the transcript of the judgment, together with the writ of error and the other documents therein specified, be transmitted to this Court. This order has operated in delay of our proceeding to final judgment, the plaintiffs having taken no steps since the record was returned into the Court of Queen's Bench.

Nov. 20.

Brewster, contra.

Per Curiam.

No rule on this motion, the plaintiffs undertaking within a reasonable time to make such motion to the Court of Queen's Bench as they may be advised.

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April 24, 28.

May 12.

Where there had been two trials, and a verdict had on the first trial in favour of the defendants, which verdict was set aside on a bill of exceptions taken to the ruling of the Judge, and a *venire de novo* awarded; and where on the second trial a verdict was had by default in favour of the plaintiffs, the defendants not appearing, and the judgment was made up, omitting the bill of exceptions and award of *venire de novo*; *Held*, *per Curiam*, a motion to amend the record by introducing therein all the proceedings comprising the pleading up to the first trial, the record and finding of the jury, bill of exceptions, and judgment thereon, was untenable.

Held also, that such judgment was regular, being founded on the *postea* and verdict therein recited; and that the bill of exceptions and the order for the *venire de novo* constituted no part of the record of the final judgment.—[BLACKBURN, C. J., *dissentiente*.]

Held also, that the statute 28 G. 3, c. 31, contemplates the award of a *venire de novo* but an order on motion, and therefore an application to incorporate into the judgment the bill of exceptions and the order for a *venire de novo* is untenable.—[BLACKBURN, C. J., *dissentiente*.]

Held also, that the Court of Exchequer Chamber had no power over the records of the other Courts.

Greene moved that the proper officer be directed forthwith to amend the record of the judgment in this cause, by introducing therein all the proceedings as the same now stand of record in this Court, comprising the pleadings up to the first trial, the record and finding of the jury thereon, the bill of exceptions taken by the plaintiffs to the charge of the Lord Chief Justice, and the judgment of the Court thereon ordering a *venire de novo*, and the verdict and judgment thereon.

This motion was twice argued before this Court by desire of the Judges.

Greene, Brewster and *Darley* appearing for the defendants, and *Martley, Macdonogh* and *Hans Hamilton*, for the plaintiffs.

Argument for the defendants.

This motion has been misunderstood by the plaintiffs' Counsel. The decision of the Court of Exchequer Chamber ought to be carried into execution as if it were a mandate from that Court. The motion is resisted as if it were an application to amend a mistake, and authorities, and the Statutes of Amendments, are relied on as if this was a misprision, jeoffail or irregularity. Our object is to have what has been recorded from time to time in this cause brought forward, but which has been incompletely sent to the Court above. This case is not affected by any of the Amendment Statutes. This is a motion that these documents be inserted in the record, of which they are clearly a part.—[PERRIN, J. My difficulty is as to whether they are part of the record.]—Any thing which, with reference to the

proceedings, is to be before the Court of Error ought to be part of the record, and we call on the Court to make it so. There is an original record in the Exchequer Chamber commencing with a writ of error, an assignment of error thereon, and incorporated therewith an allegation of diminution, the CHIEF JUSTICE certifies a transcript, which is *quasi* of record, the writ of *certiorari* is also of record, and the return thereto, with the documents required, returned by the CHIEF JUSTICE. The effect of a *certiorari* is that the original documents must go, with the return to it, to the Court above. The imperfect record is only a transcript, the other portion is an original record. It is quite distinguishable from an order on a new trial motion; there the matter set aside ceases to have any existence at all. A new trial is a modern course adopted, and is a matter of discretion; the new *venire de novo* (though awarded) does not appear on the record; it would be error if it did. Originally there was no remedy if a jury misconducted themselves, and new trials were intended to remedy this; but the award of a *venire de novo* was a Common Law proceeding, founded on some error in the first trial. Thus an Inferior Court could not award a new trial, but could award a *venire de novo*, and then both verdicts appeared on the record: *Bayly v. Boorne* (a); *Wood v. Gunston* (b); *Ratcliff v. Dudeney* (c). In *The King v. Edmonds* (d) Lord Tenterden held that the disallowing a challenge was a ground for a *venire de novo*. The difference between a *venire de novo* and a new trial is, first—that one is as ancient as the Common Law, and the other is modern; one is for matter of law, and the other for matter *dehors* the record: *Corner v. Shew* (e). The practice in criminal cases shows this difference also: 1 *Chitty's Criminal Law*, p. 654; *Grady and Sc. Cr. Prac.* p. 140; *Wells v. Parker* (f). Now, the 28 G. 3, in using the words "*venire de novo*" must have meant the Common Law judgment of *venire de novo*. You cannot read them as identical with new trial; that would oust the jurisdiction of the Court of Error altogether, and repeal that Act; for if it be a matter of discre-

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(a) 1 Stra. 392.

(b) Sty. 466.

(c) Sty. 176.

(d) 4 B. & Al. 473.

(e) 4 M. & W. 167.
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tion, the Court of Error has no power to review it. The object of the Statute of Westminster was to give the Court power to examine on an authentic document. The 28 G. 3 incorporates such bill of exceptions in the *postea* in order that the Court of original jurisdiction may examine it and award a *venire de novo*, &c. The award of the *venire de novo* is the warrant for that writ; but an order for a new trial is followed by the issue of a writ.—[CRAMPTON, J. Suppose a motion is made to the Court to arrest a judgment, and that motion is refused, is that incorporated in the judgment that the defendant *eat sine die*?]—If the bill of exceptions was the foundation of the order to arrest the judgment, then the Court of Error would have jurisdiction; but if it were a mere motion, it would be otherwise: *Tidd's Forms*, p. 332; *Adams v. Meredith* (a); *Goldstein v. Foss* (b). All the precedents are in our favour: *Loveday's case*; *Coke's Entries*, pp. 395, 253; *Lilly Ent.* p. 269; 2 *Saund.* p. 253.

Argument for the plaintiffs.

This is a motion in form to amend the record; but in substance it is really the reverse. The Statutes of Amendments are repudiated by the defendants; they say they want to have the whole brought forward, not by way of amendment, but as diminution; but these statutes are the foundation of the jurisdiction. Here there is no misprision or any application by the party bringing the writ of error. The power of the Court to meddle with its records is limited only to sustain judgments defective in form. It is said the Exchequer Chamber has ordered this alteration. Courts of Appeal have no power to order the Courts to alter their records: *Green v. Miller* (c). When error and diminution are alleged, the *certiorari* issues merely for verification. The judgment roll is valid and complete in all respects; it is made up according to the settled practice of this Court, and which was never questioned for sixty years until the case of *Kennedy v. Gregg*. The cases of *Begbie v. Clarke* and *Howard v. Shaw*, relied on by the defendants, were done on consent. There is no authority to show the jurisdiction of this Court to alter

(a) 3 Y. & Je. 219.

(b) 2 Ibid. 146.

(c) 2 B. & Ad. 781.

a judgment regularly made up and free from error. Before the Statutes of Amendments, a judgment could not be altered after the Term: 8 *Coke*, p. 156, *a*. The statute 8 *Hen.* 6, c. 12, was passed to alter that, and an amendment was thereby allowed, but only in affirmance of the judgment; but matter wholly omitted cannot be introduced by amendment: *Roll. Abr. Error*, G.—
 [CRAMPTON, J. If the judgment roll be diminished, has not the Court authority to amend the roll in the matter diminished?]
 —Not on behalf of a party bringing error, or for the purpose of importing error into the record. The party is without remedy if the record be amended, and therefore it can only be done to remove error. The matter returned by the *certiorari* is not necessarily matter of record; it is matter of record in one sense, but not necessarily a part of the judgment roll. The *Nisi Prius* roll is part of the judgment roll when judgment is founded upon it; but not when set aside and another trial had. We do not deny there may be a distinction between a *venire de novo* at Common Law and an order for a new trial; but the question is, whether a *venire de novo*, granted under the 28 *G.* 3, is to be similar to the one or the other? The power to bring a bill of exceptions before the statute was only to have it examined in the Court of Error; it then became a part of the record, but not before. In order to prevent delay the statute enables the Court of original jurisdiction to examine it. The exceptions become part of the *Nisi Prius* record and the *postea*, but no further, and the Court are to give judgment which would be final, or arrest the judgment or award a *venire de novo*. A case has been cited showing a writ of error on judgment entered upon arrest of judgment: *Anonymous* (*a*). The old mode of arrest of judgment was by pleading, and the Court omitting to give judgment, the parties were told to go thereof without a day: *Co Lit.* 288, *b*. The Legislature, in passing the statute, had in view a difference between a judgment to be reviewed in error and an order which was not to be reviewed; for if it be construed otherwise, its object would be frustrated, and instead of speeding the party, it would delay him and increase costs. It would lead to a useless trial, namely, the second one, and the record would be lengthened by the first trial appearing upon it. The defendants contend that they

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have a vested right in the first record; but it is well settled that the Court may, by a new trial, deprive a party of his first verdict; therefore there is no absolute rule showing such a right in the defendant. The statute never intended to give such a right; it was passed for the benefit of the exceptant. The precedents in the old books setting out two verdicts cannot control the practice of this Court for sixty years, it not being contrary to justice.

Defendants' argument, that unless this motion is granted there is no remedy, is shown by the practice of the Exchequer Chamber to be not well founded. A writ of error is an original proceeding, to which the return is the transcript of the judgment roll made up according to the practice of the Inferior Court. Plaintiff in error is not thereby conclusively bound; he assigns error, and if he choose, alleges diminution. It is a pleading showing what is alleged as error, and praying a *certiorari* to verify it. Plaintiff in error thus proceeds to prove his allegation of error and obtain the matter diminished: *Gully v. Ezeter* (a); *Batchelour v. Parsons* (b).

In *Richardson v. Mellish* (c), Lord Tenterden observes on orders, but says he has no power to review them sitting in a Court of Error. That was an application to amend judgment roll under the statute in Court below; the King's Bench reversed the judgment; the judgment was amended afterwards; then error to the House of Lords; opinion of Judges as to appeal against amendments by Court below. This was brought before the Court of Error by allegation of diminution, and the orders returned thereon. The record was not altered by inserting the order. But if this alteration were made, the Court of Error could not review that alteration. Therefore if this motion be granted, no matter whether the alteration be compatible with principle or practice, the Court of Appeal cannot review it. Have the Courts of Error a right to consider the order of *venire de novo* in the Court of original jurisdiction? If the award be in the nature of a judgment or interlocutory, this question may be decided on the document returned to the *certiorari*: *King v. The Queen* (d).

Curr. ad. vult.

(a) 5 M. & Ry. 457.

(b) Sty. 292; Lord Lyndhurst in note. (c) 2 Bing. 335; 1 Cl. & Fin. 224.

(d) 7 Q. B. R. 795.

BLACKBURN, C. J.

The motion in this case has been depending since last Hilary Term. The importance and the difficulties of the questions involved in it induced us to have it argued a second time, and we have had all the assistance which the learning and talent of the Bar could afford us.

It is necessary for me shortly to recapitulate the proceedings that have taken place. The case has been twice tried before me; there was a verdict for the defendants on the first trial. A bill of exceptions was taken by the plaintiffs, which, on argument, was allowed, and a *venire de novo* entered in the rule book. The record for the second trial by Nisi Prius was made up without noticing the first trial, the bill of exceptions or the order for a *venire de novo*, and continuances were entered by *vicecomes non misit breve*. This was all done according to the practice of this and the other Courts, which practice manifestly imports that an order for a *venire de novo* on a bill of exceptions is to be deemed similar to an order for a new trial on motion, addressed to the discretion of the Court. On the second Nisi Prius record there was the second trial; the defendants did not appear; the plaintiffs had a verdict and final judgment. The defendants brought a writ of error, and I returned and certified a transcript of the judgment, which was enrolled. The plaintiffs in error alleged diminution in respect to the first verdict, bill of exceptions and order for a *venire de novo*, and having obtained a *certiorari*, I returned the original Nisi Prius record, bill of exceptions, *postea*, and a copy of the order for a *venire de novo*. After this the plaintiffs in error moved to have the transcript and other records sent back to this Court; this having been done, the present motion was made.

I pass over the arguments that have been addressed to us with a view of showing that we do not possess the power of making the amendment. I do so, not because I think them undeserving of serious consideration, but because they do not form the ground on which my judgment or that of either of my learned Brethren will be founded.

P. Pending at once to the most important topic involved in this motion, I regret to say that I am obliged to differ in it from the other

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Members of the Court. That topic is the construction of the Irish statute 28 G. 3, c. 31. The question it gives rise to is, whether an order for a *venire de novo* pronounced on the allowance of a bill of exceptions is to be considered as an award of a *venire* on matter of record, or as an interlocutory order on motion addressed to the discretion of the Court? If the Legislature meant that the award of the *venire* was to be of record, the bill of exceptions and the order for the *venire de novo* should have been recited in the Nisi Prius record, and have constituted a part of the record of the final judgment. If the Legislature meant it to be as an order on motion, it will follow that the first trial, verdict and exceptions have been properly omitted, that the record of the final judgment should not have included them, and that the motion before us is untenable.

I have already adverted to the practice of the Courts in conformity with which the record has been made up. I have no reason to doubt its uniformity and consistency. I admit that the sanction which it gives to the argument of the plaintiffs is of great weight and authority. I have no intention whatever to detract from it, when I say that I wish there had been some decision or *dictum* to show that at any early period of its adoption it had been brought under the view or cognizance of any of the Courts. In the very recent case of *Kennedy v. Gregg*, though we were not called on to make a decision affirming its validity, its existence was recognised so far as regarded the manner and form of entering the continuances and the award of the *venire de novo*; but it will be seen from my judgment I assumed that the practice would not ultimately prevent the defendant from having the order of the Court allowing the exceptions examined by writ of error. This assumption, on mature consideration, I am bound to say was not well founded, and it is therefore that I think myself entitled, and indeed bound, to inquire whether this practice, however strong the presumption which it justifies of contemporaneous exposition, be or not a violation of the plain meaning of the statute, and the deprivation of an important right which that statute confers on the subject.

In considering whether it does or not, we cannot have any aid from English authorities. In England the course of proceedings on bills of

exception depends on the Statute of Westminster; so it would in Ireland but for the Act of the 28 G. 3, c. 31. By the Statute of Westminster a bill of exceptions is always of record, and, as Chief Justice De Grey says, in *Fabrigas v. Mostyn* (a), "is ordained by the Legislature to be in the nature of a writ of error," that is, it is an allegation of error on the final judgment of the Court, and examinable as such. In Ireland the matter of the exceptions imputes error to the verdict, the result of the erroneous direction or ruling of the Judge, which the Court is to confirm or set aside: if the exceptions be overruled, there is final judgment; if allowed, there is a *venire de novo*. If overruled, they must form a part of the record; the question is, are they not equally so when they are allowed? The statute, equally applicable to both, makes them, in my opinion, a portion of the record before the Court hears them argued; for it enacts that the bill signed by the Judge shall remain with the Clerk of Nisi Prius, and be incorporated in the *postea*, and returned therewith to the Court. I have not heard any argument to raise a doubt in my mind that this makes the bill of exceptions a part of the record; if it is, the decision of the Court, whatever it is, must be of and upon the record, and if erroneous, liable to be reversed on writ of error. I can see no reason why there should be any distinction between the case in which the Court errs in setting aside a verdict, and that in which it errs in confirming it—a practice founded on such a distinction, which, in the one case allows the decision to be examined and reviewed, and in the other precludes all inquiry and appeal, seems to me to be both unreasonable and unjust. Justice requires that the parties injured in either case should have the same means of redress, and I see nothing in the statute to warrant the practice which excludes one of them from complaining by suppressing in the judgment the matter by which he is aggrieved, and substituting for it a series of fictitious continuances. To avoid the force of this reasoning, and escape from what I may term the anomaly of dealing so unequally and inconsistently, it is argued that if the Court have done unjustly in awarding a *venire de novo*, the party whose verdict has been set

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(a) 2 Wm. Blac. 929.

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aside may on the second trial insist that the Judge should adopt and repeat the direction or opinion which the Court had already pronounced to be wrong, and then, by taking a bill of exceptions, secure the decision of the question by a superior tribunal. That this mode of redress may in some cases be possible, I do not deny; but even though it were equivalent to the right of directly impugning the erroneous decision by bringing a writ of error (which for obvious reasons I think it would not), it is, in my opinion, not a satisfactory or sufficient answer to the objection that the second trial was had under an order which was wrong in directing it, and that the party had a right to judgment on the verdict which that order had set aside. I would further add that this practice, which puts a *venire de novo* or a bill of exceptions on the same footing as an order for a new trial, is open to the objection that the matter of an exception that would warrant a *venire de novo* in one case would equally do so in the other; except therefore that the decision of it on the record were to be followed by different consequences, that is, to be subject to appeal, I can see no reason for putting the question on record at all; indeed the vast expense of doing so shows that there must have been some other and ulterior purpose which would not be achieved by an order on motion for a new trial.

Having stated the view I entertain of the construction of the Irish statute, and of the practice to which it has given rise, it would have been satisfactory to me if the record could have been so made up as to enable the parties to have this important question decided in the Court of Exchequer Chamber or the House of Lords. If it shall be finally decided by either of these tribunals that the practice is right, and that the order allowing exceptions is to be acted on as an order on motion for a new trial, no injury could be done to the plaintiffs, their judgment would be affirmed. On the other hand, while the record remains as it is, the consideration of this most important matter is utterly excluded from the cognizance of a superior tribunal; for I am satisfied that even if diminution were alleged as before, and the record of the bill of exceptions and order returned by *certiorari*, the plaintiff in error could not assign error in this respect, for matter cannot be assigned for error that contradicts

the record: *Jaques v. Cesar* (a), and the cases there referred to. That such a contradiction would exist, is obvious, for the record shows continuances of the original *venire* by *vicecomes non misit breve* from issue joined to the time of the second trial, whereas the proceedings returned would show that the *venire* had been returned, a trial had on the first *venire*, and that there had been judgment for the plaintiff, not founded as the record states it, but on a new *venire* awarded, upon the record.

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Under the impression and entertaining the opinion I have expressed, though being aware that my learned Brethren differ from me, I know that there cannot be any rule on this motion, I yet feel it right to consider whether there is any thing to prevent us making the order in the terms required, and I confess that I think there is, and that though possibly the objections and difficulties I am about to state might be obviated by some other form of application, yet that at present I see no mode by which the Court can do so. Now when I look to the record of the judgment which is enrolled, and to all the other records in the cause, of which it is the result and summary, I cannot see how the officer of the Court could execute the order sought for. It has been stated by Mr. *Greene*, in the course of his able and learned arguments, that what he requires is to have all the matters of record included in the final judgment, and that he does not require either addition or alteration. I have already stated enough to show that some alteration must be made, for several of the continuances must be expunged, and their place supplied by the substitution of the first verdict, bill of exceptions and *venire de novo*.

But waiving the consideration of this, let me advert to that important stage of the proceeding that commenced when the verdict was avoided by the allowance of the exceptions. I agree with the defendants' Counsel, and therefore now assuming that the new trial should have been by force and authority of the order on the record awarding a *venire de novo*, as a necessary consequence it followed that, in the *Nisi Prius* record the bill of exceptions and that order ought to have been set forth, for it was these proceedings in the interval between the first and second trial that kept the cause in Court,

(a) 2 Saund. 101, a.

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and prevented a discontinuance, so that their omission, and the entries of *vicecomes non misit breve* in their place, made this record irregular. If this was so, then it seems to me that the defendants ought to have complained of this while it was in the power of the Court to correct it. They must be taken to have known it when served with notice of trial, and might and should have applied before the plaintiffs were entitled to judgment ; but they omitted so to do, and suffered judgment to be entered by default on the *postea* on that record ; and though they afterwards made applications to the Court, they were similar to the present, and did not question or complain of the irregularity of the *Nisi Prius* record.

But it is not merely as an irregularity waived that I now regard it. The order we are asked to make, however general in its terms, must be understood in the execution of it to have this qualification, namely, that the judgment is to be made up in conformity with, and not in contradiction to, the actual record of the proceedings in the cause. Now, whether right or not, the *Nisi Prius* record makes the original *venire* awarded immediately after issue joined the authority for the second trial, and the officer must take this as it is. He has no right to substitute another for it, or to make up the record of the judgment as if the second trial were had by the authority of a *venire de novo*. In this particular therefore the order we are asked to make could not effectuate the end proposed, nor indeed could any order do so, unless the officer was directed to have no regard to the *Nisi Prius* record on which the trial was in fact had, and which it is not sought to amend or set aside.

These remarks are sufficient to convey my reasons for thinking there can be no rule on this motion. I may, however, state another ground for the same conclusion. The judgment on the second *postea* is enrolled, and there is no application to vacate or open the enrolment. How can we order a second judgment to be made up ? If we should do so it must be enrolled, so that there will be two judgments in the case. I do not mean to say that the Court might not provide by its order for this, or allow the defendants to amend the form of their application. It shows, however, the difficulty and indeed the impossibility of complying with the present application,

and the extent in which a compliance with it would involve the necessity of altering the existing record.

CRAMPTON, J.

This is the third time this motion substantially has been brought before the Court. Twice it was refused. The first motion was before judgment, on motion calling on the Court to direct the officer to make up the judgment in the manner sought by the first notice. That motion the Court refused. After judgment the motion was renewed, and was refused, with costs. The general course of the Court is not to reconsider on the same materials a motion which has once been solemnly decided, and so also in England : *Greathead v. Bromley* (a); *Schumann v. Weatherhead* (b). The motion is now made for the third time upon the same materials, but under new circumstances. The judgment being made up according to established practice, the transmiss went to the Court of Error. There the defendants (plaintiffs in error) alleged diminution. They had a *certiorari* from that Court, and in obedience to that writ the records now sought to be introduced into the roll were transmitted; the plaintiffs in error then, on their own motion, had these records, as well as the transmiss, sent back to this Court to enable them to make the present motion.

It has been argued on the defendants' part that the last order of the Court of Error amounts to a mandate from the Superior Court to this Court to make the amendment sought for. But this is a mistaken view of the subject. This Court, and this Court only, can deal with its own enrolments. Over them the Court of Error has no control, and accordingly the order was merely to send back the transmiss to the Queen's Bench, no doubt to enable the defendants to make this motion. The case of *Green v. Miller* (c), if we wanted an authority, is decisive on this point.

Much argument was expended to show that the *postea*, and the bill of exceptions incorporated therein, was a record of the Court; and no doubt it is a record, but no part of the record of the judg-

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(a) 7 T. R. 455.

(b) 1 East, 537.

(c) 2 B. & Ad. 781.

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ment. On the same principle the *postea* of a former trial, in a case where on motion a new trial has been granted, is equally a record of the Court; but in neither case is the *postea* part of the judgment, unless incorporated into the roll. The word "record" is used sometimes in a higher sense, and sometimes in a lower sense. In the higher sense it means the roll of the judgment and the solemn record of the proceedings in a cause from its commencement to its close. In a lower sense it means all the orders and proceedings of the Court which are recorded in their books or upon their files; and so we speak of *Nisi Prius* records, and these lower records which supply the materials from which the roll itself is made up. The case of *Mellish v. Richardson* illustrates this distinction, and demonstrates that these lower records are not the subject of diminution. Some of these records in the lower sense of the term are incorporated or abstracted into the roll, and some are not; and the main question involved in this motion is, whether the first *postea* recorded in this cause should have been incorporated or abstracted into the roll of the judgment?

This leads me back to the motion now before us; and in addition to the difficulties pointed out by the CHIEF JUSTICE, I see insuperable obstacles to the granting of the defendants' application. First, the judgment, as it appears upon the roll and in the transmiss, is perfectly regular. It is founded on the *postea* and verdict therein recited, and not at all upon the prior superseded *postea*; and it is sought by the defendants' motion to incorporate, under the name of amendment in the record, another *postea* and another verdict contradicting the record as it stands, and thus introducing of necessity error into the record. That is one principle which this motion, if granted, would violate: *Tyson v. Hillyard* (a). Secondly, at Common Law no amendment, however minute, could be made in the roll after the first Term, and the Statutes of Amendment apply only to cases in which the error arises from the misprision of the clerks, and where the amendment is to support, not to overthrow, the judgment. It was upon the argument ultimately admitted that the amendment sought could not be made under the Statutes of Amend-

(a) 2 Ld. Raym. 1123.

ments; and the case was rested on the doctrine of diminution, and the Common Law. E. T. 1851.
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The argument was that the first *postea*, incorporating the bill of exceptions, was necessarily part of the proceedings to be inserted in the judgment roll. The doctrine was laid down in strong language. It was said that it was a matter of right in the party, and of duty in the Court, to have the first *postea* inserted in the roll. Indeed the argument was that the defendants had a vested right in the verdict which they had got, and which could not be divested by subsequent proceedings. The result of this argument would be (and it was so put confidently enough) that all the proceedings after the award of the *venire de novo* were *coram non Judice*, and utterly void. No doubt it was presumed that the award of the *venire de novo* was erroneous, and that the defendants for their argument had a right to assume; but what a monstrous anomaly is this, that after a bill of exceptions allowed—after a new trial, perhaps a new bill of exceptions, perhaps a special verdict—that all those long and expensive proceedings shall be held to be mere nullities if it should turn out that an exception, perhaps unconnected with the merits of the case, should have been erroneously allowed. I put this case to the learned Counsel who pressed the argument upon us:—Suppose an action upon a writing, and at the trial the defendant objected to receiving the writing in evidence for want of a stamp, or that the stamp was insufficient, the Judge below rules in favour of the objection, and the defendant gets a verdict, and the plaintiff excepts to this ruling. Suppose then the Court to allow the exception, thereby determining no stamp to be necessary, or that the stamp was sufficient, the Court of course awards a *venire de novo*, and at the second trial the plaintiff *pro majori cautela* having had his writing duly stamped, shows a clear title to, and gets a verdict and judgment, and then there is a writ of error, what should be the result? I here assume the ruling of the Judge below to have been right; and I asked whether the first verdict, founded on a point utterly remote from the merits, or the second verdict, founded on the undoubted merits, should prevail? The learned Counsel was obliged to answer that the first verdict should prevail, the proceedings upon

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But is this a case of diminution at all ? I think it is as clear that it is not a case of diminution as that it is not a case for amendment. But first remove the argument that the Court of Exchequer Chamber has decided this to be a case of diminution. The *certiorari*, upon an allegation of diminution in the Court of Error, generally issues as a matter of course. The allegation is only a pleading, as the allegation of error in the same assignment is also. The records or proceedings returned in obedience to the *certiorari* are only evidence of the assertion of diminution, and become the subject of consideration for the Court above, and if there be a further writ of error to the higher Court, for its consideration also. The plaintiff in error in this case did not call for the consideration of the Court above upon the documents sent up ; but voluntarily and of his own motion got an order to send back these documents, as well as the transmiss, to this Court, in order to enable him to make his motion for amendment here. It is therefore now for this Court to decide whether there has been diminution as alleged, or whether the defendants have now a right to have these documents inserted into the roll of the judgment, or whether it would be a sound exercise of even discretion (if any we have) to comply with the defendants' application.

But again I say this motion is not only of the first impression, but it calls upon the Court to violate its uniform and established practice. It is a motion against the practice of this Court and of the other Law Courts of this country. This after-search and investigation is certified to us by the Master of the Court. One, and only one, deviation from this course of practice is found upon our records ; that is the case of *Howard v. Shaw*, which was three times tried in this Court. The first trial was in the year 1843, when there was a verdict for the plaintiff got. That verdict was set aside upon

motion. There was a second trial in 1846, when there was a verdict for the defendant, subject to a bill of exceptions taken by the plaintiff. The exceptions were allowed, and a *venire de novo* was awarded in Easter 1846. There was then a third trial, at which the defendant *did not appear*, and judgment was marked for the plaintiff. The parties at this stage of the proceedings were desirous without further delay to have the opinion of the Court of Error upon the important questions appearing on the bill of exceptions; but if the judgment were made up according to the practice of the Court, the bill of exceptions would not appear upon the record, or the transmiss. The parties (the officer declining to depart from the established practice) entered into a consent to have the record made up so as to include the bill of exceptions in it; but the officer could not act upon the mere consent of the parties without the authority of the Court, and thereupon Judge Burton (in Chamber) was moved to make the consent a rule of Court; and accordingly he made the order, and thereupon the officer made up the record according to the consent rule. This record, however, did not go before the Court of Error, for the judgment was subsequently vacated by consent. This single case of deviation demonstrates what the practice of the Court is, and that such a record, as the defendants now insist that they have a right to, could not be made up *without the consent of the parties*, and without, in addition, the order of the Court.

Here then is the established and uniform practice of the Court, which this motion calls upon us to violate; and I add, it is a practice founded on and consistent with the statute (the 28 *G. 3*, c. 31), by virtue of which bills of exceptions are examinable in the Court below. Until this statute in Ireland (and still in England) a bill of exceptions was only examinable in a Court of Error. Though no part of the record itself, by the statute of 13 *Edw. 1* (stat. 1, c. 31) it is annexed to the record, and the Court of Error is compelled to pronounce judgment upon the record and exceptions as if they were part of the roll. To remedy the delay and expense consequent upon the necessity of a writ of error, and to give the parties the opportunity of having a cheap and expeditious examination of the bill of exceptions, the Irish statute of 28 *G. 3*, c. 31, was passed. That statute

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directs the bill of exceptions to be incorporated with the *postea*, and it gives the Court below authority to examine the exceptions, "*and give judgment thereon, or make such order either by arresting the judgment, granting a venire facias de novo or otherwise, as shall be agreeable to justice.*" This enactment appears to have been most accurately framed; it briefly but clearly provides for every case—first, *where judgment is to be given*; secondly, *where judgment is to be arrested*; and thirdly, *where a new trial is to take place*; and one cannot fail to observe the contrast between the terms *judgment* and *order* in this short enactment. The Court may give judgment for the party having the verdict upon disallowing the exceptions, or they may arrest the judgment, that is, refrain from giving any judgment as between the parties upon the verdict returned; or they may make *order* for a *venire de novo*, or otherwise, as may be agreeable to justice.

It is admitted by both parties that no writ of error lies upon the award of a *venire de novo* by the Court below; that was decided in *Kennedy v. Gregg*, and to hold otherwise would be to defeat the object of the statute. The award of a *venire de novo* is but an order; it is *no* judgment, and in substance is the same as an order for a new trial: the difference only seeming to be that the latter order is made upon the Judge's notes, and the former is made upon the examination of the bill of exceptions under the statute. But still it is only an order; it is made not upon matter of record but upon facts entered. And I may here observe that if the vested right to a verdict, so strongly contended for by the plaintiffs' Counsel, did really exist, it seems strange that in the great majority of cases in which a new trial is ordered, this vested right should be so totally disregarded.

The nature of an exception is, I think, overlooked; it is confined to a single point; it complains of the trial, of some erroneous ruling or direction of the Judge, but goes not to the whole case; whereas the defendants' argument rests much upon the ground that the whole of the case is involved in the validity or invalidity of the exception.

The examination of the statute itself and its terms would lead me

to the inference that the Legislature, whose object by this enactment was to obviate delay and costs, never contemplated that the order for a *venire de novo*, founded on the bill of exceptions, was to involve such tedious and expensive proceedings as the defendants' construction would necessarily involve, but that it was to follow, as nearly as might be, the analogy of the order for a new trial upon motion. That analogy has been constantly followed in practice—a practice of above sixty years' standing, and a practice founded upon the first construction of the statute, bringing it within Lord Coke's rule, *cotemporanea expositio fortissima est*.

Whether a writ of error lies from an order to arrest the judgment, has been made a question; and there were cited two cases in the English Exchequer Chamber in which such writs were allowed; but giving no opinion on that subject, I observe that there is this marked distinction between an order to arrest the judgment and an order for a *venire de novo*, namely, that the former is a *final order*, and the latter is merely interlocutory. The practice of the Court, and the cotemporaneous exposition of the statute of 28 G. 3, and, I will add, the sound construction, is against the defendants' motion; and while noticing the practice and the statute of 28 G. 3, let me here advert to the opinion of Lord Chancellor Cottenham upon this subject, when, considering the case of *Gahvey v. Baker* (a), his Lordship says:—"The Irish Act, in some respects, "alters the mode of proceeding, and gives power in matters relating "to bills of exceptions; but whether it really alters the mode of "proceeding, so far as to justify the course here adopted, is a question that may be somewhat doubtful. It may, on this subject, be "material to inquire what has been the usual course of proceeding "in Ireland, and what has in this way been the interpretation put "by the Courts on the statute. It is obvious that it is a wholesome "exercise of power, to prevent the unnecessary expense of parties "going down to another trial when the result is settled by the law "beforehand." There giving force to the practice and to the interpretation of the statute manifestly pursued in the practice of the Courts.

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(a) 7 Cl. & Fin. 398.

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But it is said to be hardship to deprive the defendants of a verdict by an order which may be an erroneous one. Two answers may be given to this complaint. The hardship (if it be one) occurs in every case in which a new trial order is made—that is, in the great majority of cases in which a second trial takes place. Secondly—The party has his remedy; in this instance he chose to waive it. He may appear at the second trial—he may have his bill of exceptions or a special verdict, and thus take his case on to the highest tribunal. This was the defendants' obvious and legal and proper course; and if they deliberately passed it by, they cannot now be heard to complain.

The English authorities are little applicable to this case. In England the bill of exceptions comes only before a Court of Error, and comes as part of the record by the Statute of Exceptions. Here it is only part of the *postea* for the examination of the Court itself. An award of a *venire de novo* by a Court of Error is necessarily upon the record. An award of a *venire de novo* by an Inferior Court must also appear on the record, for such a Court cannot order a new trial. Again, wherever from the nature of the previous proceedings in one of the Superior Courts, the award of a *venire de novo* appears on the record, as in the case of a defective special verdict, the award of a *venire de novo* must be examinable by a Court of Error; and the English cases relied on as furnishing analogies to support the defendants' view are all cases referring to one or other of these classes. But where, as here, the award of the *venire* is not by a Court of Error, not at Common Law upon matters appearing on the record, but was a statutable *venire de novo* to cure the mistake of a Judge at Nisi Prius, it would be defeating the object of the statute, after long and expensive proceedings founded upon the award of the *venire de novo*, to hold that all these should go for nothing.

But even in England, whatever may have been the practice and course of precedent in ancient times, we have the high authority of *Serjeant Williams* for the position that the modern practice is to leave out in making up the record the first *postea* altogether: *Greene v. Cole* (a); and he makes no distinction between the cases

(a) 2 Saund. note 8, 253.

of a new trial upon the award of a *venire de novo* and a new trial upon motion, although the case before him was a case of error from an Inferior Court. This I take to be a most important authority.

There is but one other topic to which I shall advert; that is, to the consequences of such an order as that now sought for. If we comply with this motion it will be to introduce incurable error into the record, and thus defeat the plaintiffs' action altogether. Whereas, if the plaintiffs' grievance be really examinable by a Superior Court, they had the authority of *King v. The Queen* for having the opinion of the Court of Error upon it; and perhaps that may be still open to them.

On the whole, therefore, I think this motion is in form and in substance against the established practice of this Court, contrary to the spirit of the statute; and its effect, if granted, would be ruinous to the plaintiffs, and extremely injurious to the administration of justice.

PERRIN, J.

I think this motion ought to be refused. There is no difference in opinion in this case as to the settled rules which govern proceedings growing out of cases on writs of error. But it is not every proceeding of record in the Court below which can be brought up on a writ of error. That which forms no part of the roll is not removable on a writ of error. Many instances may be given of this; but the ordinary case is quite germane to the matter. Where an order for a new trial is granted, it is no part of the roll; still it is put on the records of the Court, but it forms no part of the record on which the judgment is given. As soon as the order is made setting aside the verdict, it ceases to be in effect upon the record; so in my judgment, when exceptions have been allowed, they cease to be in effect on the record. It is quite different from an order on an unsatisfactory special verdict. So an order made to arrest the judgment is quite distinguishable from the present; for it is an order not on the *postea* but on the pleadings on the whole record.

The order here is no judgment, it is merely an allowance of the

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exceptions which neither appear on the record or on the roll. They do not appear on record in any Court in Ireland since the statute, and I find for years before the passing of the statute the practice of placing them on the record did not exist. There is a case reported in the year 1686, in which this very proceeding was taken. In *Howard*, Pleas side Exchequer (which although not a book of authority, yet as written by an officer of the Court, must have some weight as to the practice of the Court at that time), it is said in vol. 1 p. 342, "In the case of *Lessee of Desminyers v. The Bishop of Killala*, in this Court, Easter Term 1686, the defendant obtained a verdict at the Assizes; the plaintiff brought a bill of exceptions, and the defendant being served with the draft or the dominicals of the exceptions in order to have them settled, and delaying to return them, the plaintiff on Counsel's motion obtained an order for the defendant to bring in the bill of exceptions the next day, or that judgment should go against the casual ejector." And again, "If the plaintiff obtains a verdict on a trial by Nisi Prius, and the defendant brings a bill of exceptions; or if the defendant obtains a verdict and the plaintiff brings a bill of exceptions, if, in either case, the bill of exceptions be adjudged good, the Court above will set aside the verdict, and in either case the plaintiff may move by his Counsel instanter for a *venire facias de novo*, and the Court will grant it to him; but if the Court above overrule the bill of exceptions, they will give judgment for the party who obtained the verdict instanter and without further motion." There it is the record on which they give judgment, but not on the exceptions which are overruled. And he adds, "But if the party against whom the judgment is given thinks himself aggrieved, he may bring his writ of error to remove the judgment and proceedings into the Exchequer Chamber." The notion from beginning to end appears to have been that although you might remove a bill of exceptions to the Court of Error, and have them there considered, yet the Court conceived before they parted with the *postea*, and before they gave judgment below upon the verdict, they might proceed to discuss on motion the matter of the exceptions; accordingly in p. 338 he says:—

"When a bill of exceptions is taken to the opinion of the Judge on
 "a trial by *Nisi Prius*, the exceptions are to be argued before the
 "Judges of the Court from whence the record issued (that is not
 "treating them as the subject matter of a writ of error); for as
 "the Judge upon such trials cannot give judgment, but the judgment
 "must be given by the Court above upon the return of the
 "*postea*, if therefore on such trials a bill of exceptions be tendered
 "and allowed, the Court will upon application for that purpose
 "defer their judgment until the bill of exceptions be disposed of;
 "and give judgment or set aside the verdict and grant a new trial,
 "as the case is. But when a bill of exceptions is taken to the
 "opinion of the Court upon a trial at bar, the Court will (as usual)
 "immediately give judgment, saving that point to which the bill of
 "exceptions is taken; and therefore in this case the bill of exceptions
 "with the record of the judgment are to be removed by writ
 "of error into the Exchequer Chamber there to be argued before
 "the Judges thereof, who will either affirm or reverse the judgment
 "as they see reason. Besides, as a trial at bar is had in presence of
 "all the Judges of the Court, it should seem absurd to argue exceptions
 "before them when they had already given their opinion upon
 "the matter of exception. *Sed quare*, for in the case of *Lessee Hill*
and wife v. Geatrakes (Hil. 1707), in this Court, a bill of exceptions
 "was taken to the opinion of the Court on a trial at bar, and
 "the exceptions were argued before the same Judges who tried the
 "cause." I allude to this not as an authority, but as the report of
 the practice of all the Courts stated by Mr. Howard, who at that
 time held a high office in the Court of Exchequer, and there is no
 reason to doubt that such was the practice previous to the passing
 of the Act.

Then the Act of 28 G. 3, c. 31, was brought in by Mr. O'Neil,
 a very eminent lawyer, and at that time several distinguished
 lawyers were Members of the House of Lords, Lord Clare, Lord
 Carleton, Lord Yelverton, Lord Kilwarden and Lord Chancellor
 Ponsonby. This Act was the subject of reports and discussion,
 and from that time down to the present the same practice which
 then existed was pursued, though not in terms continued by the

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Act. The Act recites, "Whereas it has been holden" (it does not say whereas the law is, but whereas it has been holden), "that bills of exceptions taken to the opinion of a Judge at Nisi Prius are not examinable in the Court in which the action is brought, and can only be examined upon a writ of error brought in a Superior Court, whereby the party offering such bill of exceptions is subject to great delay and costs;" it then enacts, "That it shall be sufficient if the Judge, to whom such bill of exceptions shall be tendered, sign same, and that it shall not be necessary for him to put his seal thereto, and that such bill of exceptions so signed shall remain with the clerk of Nisi Prius, and be incorporated in the *postea*, and be returned therewith to the Court in which the action is brought, which Court shall have authority to examine same and give judgment thereon, or make such order either by arresting the judgment, granting a *venire facias de novo*, or otherwise, as shall be agreeable to justice."

It appears to me that such an order as this is plainly distinguishable from a judgment. In *Lord Trimlestown v. Kemmis*, Chief Justice Tindal, expressing the opinion of the Judges as to whether the Court of Exchequer Chamber had a larger power in adjudicating upon a cause brought before it by writ of error after a bill of exceptions tendered than a Court of Error in England, says:—"The object of the Act of 28 G. 3, c. 31, is clearly expressed by the preamble to be, to enable the Court, in which the action is brought, to examine the exceptions to the opinion of the Judge at Nisi Prius, instead of removing the same by writ of error into a Superior Court; and for that purpose the statute enacts that the bill of exceptions shall be incorporated in the *postea*, and be returned therewith to the Court in which the action was brought, which Court shall have authority to examine the same and give judgment, granting a *venire facias de novo*, or otherwise, as shall be agreeable to justice. Now, in the first place, this statute does not relate to the Court of Exchequer Chamber, but merely gives to the original Court in which the action was brought the power to deal with a bill of exceptions, which it did not before possess; and in the next place we are of opinion that it gives no

"authority to that Court to proceed upon any other rule or ground
 "of decision than that which before belonged to the Court, and
 "governed the decision upon a bill of exceptions. For the words
 "'to give judgment thereon' mean either for the plaintiff or de-
 "fendant, according to the merits of the exceptions. The words
 "'to order judgment to be arrested' mean only in case any matter
 "appears on the record of the action which calls upon the Court
 "so to do; the words 'to grant a *venire facias de novo*' mean
 "the ordinary judgment where the exceptions are allowed; and
 "the words 'or otherwise as shall be agreeable to justice' mean
 "that the Court shall make any other order which the consideration
 "of the bill of exceptions, as a bill of exceptions, calls upon them
 "by law to make." That does not convey the power to make such
 other order; I would say, having all the matters before them incor-
 porated in the *postea*, they must make such order thereon, that is,
 upon the whole matter before the Court. Thus we have the strongest
 instance of cotemporaneous exposition, and the language of the sta-
 tute would lead directly to show that the Legislature were aware of
 the existing practice; and from that time to the present there has
 been no instance of a proceeding in any other way.

As to the effect of the rule, it may be hard on the defendants, at
 the same time it would have been no great hardship for them to
 have appeared at the second trial. Again, if all these matters were
 to be embodied in the record, it would be a manifest denial of justice.

I therefore think the rule should be refused. The statute, I
 think, imports and adopts the ancient practice of every Court, so far
 back as the year 1686, and has been since followed by every Court.
 The statute makes the exceptions part of the *postea*, and where they
 are allowed they ought not to appear on the record; and the party
 suffers no injury except by his non-attendance at the second trial.
 I therefore am of opinion that this motion ought to be refused.

No rule.*

* Mr. JUSTICE MOORE declined taking any part in the decision of this case, as
 he had been originally one of the Counsel engaged.

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LEAHY v. MALCOMSON and others.

April 15.

Where a defendant obtained an interpleader order staying a plaintiff from proceeding in an action of trover for certain goods, on condition that these goods should be returned to plaintiff, and which were in pursuance of such order returned, the plaintiff was restrained prosecuting another action for the non-delivery of these goods within a reasonable time.

J. D. FITZGERALD (with him *Meagher*) moved on part of the defendants, that the plaintiff be stayed proceeding further in this cause ; or that so much of the declaration as complained of the detention of the goods therein referred to be struck out, on the ground that the same was a violation of an order of the Court of Exchequer of the 15th of July last.

It appeared from the affidavits that the defendants were the proprietors of steam vessels trading from London to Dublin, and that in March 1850 some packages containing furniture and other goods were shipped for Dublin by the plaintiff on board two of the defendants' vessels, the "Ranger" and the "Citizen." On the arrival of the "Ranger" the Captain was served with a notice by a person named Richardson, claiming property in these goods, and cautioning him parting with the possession of them ; a person named Good also made a similar claim. On the 1st of May two writs out of the Court of Exchequer, at the suit of the present plaintiff, were served on the defendants, and appearances were duly entered thereto, and declarations in trover filed against the defendants for these goods. On the 29th of June a conditional order was obtained by the defendants under the Interpleader Act, calling on the claimants Good and Richardson to interplead. Good made an affidavit in support of his claim ; but neither he or Richardson appeared on the hearing of this order, and an order was made by Richards, B., in Chamber, that they should be barred prosecuting their claims against the defendants in these causes, without prejudice to their rights (if any) against the plaintiff, and that all further proceedings in these causes be stayed without payment of costs by the defendants to the plaintiff ; the defendants undertaking to deliver over to the plaintiff the possession of the goods, the subject-matter of these actions, upon being paid freight

and proper charges for storage and portorage incurred to the 11th of April last, but not beyond that day; and that Good should pay the defendants their costs of these actions respectively, and of the order of the 29th of June, and of this motion. The goods were thereupon delivered to the plaintiff. On the 29th of November following the plaintiff issued two writs out of this Court—one against all the defendants, and another against some of them—and filed separate declarations in case thereon, charging the defendants in one count with negligence and want of due care in the carriage of the goods, and in another with not having delivered the goods within a reasonable time.

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The question here is whether, after the Court of Exchequer, under the Interpleader Act, has adjudicated upon the rights of the parties, and the goods were handed over to the plaintiff under the order of that Court, he can now have an action for the detaining of these goods? We say that he should be confined to the action for the injury done to these goods, the detainer having been already adjudicated on by the Court of Exchequer; and if the plaintiff had any other claim against the defendants, he should have his right to proceed against them on that claim reserved to him: *Lewis v. Jones (a)*. The English County Courts Act contains a similar provision to 9 & 10 Vic. c. 64 (the Interpleader Act); and in a case like the present the course we are now pursuing was adopted: *Jessop v. Crawley (b)*; *Chater v. Chignell (c)*.

H. Smythe and Macdonogh, contra.

The plaintiff has a right to proceed with both actions. The defendants are here calling on the Court to decide by motion what is on the record. The interpleader order is only confined to the property in the goods, but says nothing of the injury done to, or care taken of, the goods, and the plaintiff should not be stayed from recovering damages therefor.—[BLACKBURN, C. J. The Court has full power to do justice under the Interpleader Act so far as concerns the subject-matter in dispute; and the intention of the

(a) 2 M. & W. 203.

(b) 28 Law Jour. Q. B. 319.

(c) *Ibid*, 520.

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statute would appear to have been to put a final end to the dispute, and leave no portion of the matter undecided. We are now called on to review the order of the Court of Exchequer.]—We have suffered special damage in our trade by the detention of the goods, and the Interpleader Act is confined to actions of assumpsit, debt, detinue and trover; it merely empowers the Court to conclude the right to the money or the goods; and had we put a special count in our declaration in the former action, the Court of Exchequer could not have interposed. We have done nothing in violation of the order of the Court of Exchequer; and even if we had violated the order, the application should have been made to that Court to stay our proceedings, these being in violation of the order of that Court; and they not having done so can only object to our proceeding by pleading a former recovery. The giving up the goods was equivalent to a former recovery, and they may plead it.

Meagher replied.

BLACKBURN, C. J.

The defendants in this action have a right to the benefit of the order made by the Court of Exchequer, and we are bound to give effect to that order so as to preclude the plaintiff making a case of complaint for which he has received satisfaction.

CRAMPTON, J.

I feel a difficulty in according to this application, as the question is placed upon the record. The case appears on the declaration, and may be brought to an ulterior tribunal; under these circumstances I feel a difficulty in deciding this question on motion.

PERRIN, J., and MOORE, J., concurred with the CHIEF JUSTICE.

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JOHN JACK,

Lessee of J. WYNNE, S. WANDESFORD and others,

v.

JOSEPH M'ENIRY.

May 1, 10.

EJECTMENT on the title, brought at the last Assizes of the South Riding of Tipperary, and tried before CRAMPTON, J., to recover certain lands in the county of Tipperary.

The declaration contained three demises, and the action was grounded on a notice to quit, dated the 22nd of March 1849, on which the question in the case turned. The notice was signed by the lessors of the plaintiff; but on cross-examination of the plaintiff's witness it appeared that when it was signed it was not filled up, but that it, with a number of other notices, was sent over to the agent of the lessors of the plaintiff in blank, being the ordinary printed form of notice to quit, containing no statement as to the lands or tenants, and simply bearing the signatures of the lessors of the plaintiff. These notices were filled up from time to time in the office of the agent, by inserting the tenants' names and lands sought to be evicted, as occasion required. The particular notice in question had been filled up in the office of the agent by his son. A demand of possession was proved, and that the defendant then made no objection to the notice, except as to the time of the determination of the tenancy.

Defendant's Counsel contended that an ejectment on the title could not be maintained on a notice to quit, signed in blank, and that the defendant was entitled to a verdict, or to have the plaintiff called. The learned Judge refused to nonsuit, but reserved the point, and, subject to it, directed a verdict for the plaintiff.

A conditional order having been obtained to set aside the verdict, or enter a nonsuit on the ground of misdirection, and the reception of illegal evidence, cause was shown by—

In an ejectment on the title, brought by trustees having the legal estate in the lands, the agent proved that he had been sent by the trustees a number of printed notices to quit, signed by them, leaving blanks for the name of the tenants and the denomination of the lands. In the agent's office one of these notices was filled up with the defendant's name, and the lands held by him, and served on the defendant, and no objection made by him. There was no evidence of any specific authority to fill up this notice. *Held*, that this was sufficient evidence to go to the jury that this notice had been served by authority of the trustees.—[PERRIN, J., *dissentiente*.]

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Rollestone and M. O'Donel, were heard in support of the conditional order.

The following authorities were relied upon:—*Lessee Lord Sligo v. Davitt* (a); *Lessee Frewen v. Ahern* (b); *Hebblewhite v. M'Morine* (c); *Hudson v. Revett* (d); *Master v. Miller* (e); *Lessee Conner v. M'Carthy* (f); *Lessee Cooper v. Flynn* (g); *Doe v. Robinson* (h); *Texira v. Evans* (i); *Story on Principal and Agent*, p. 31.

Cur. ad. vult.

MOORE, J.

May 10.

This was an ejectment on the title, brought on several demises, and among others, by Wandesford and Wynne, and it was brought on a notice to quit.

It is admitted that the lessors of the plaintiffs, Wandesford and Wynne, had been the landlords of the defendant, who held under them as tenant from year to year. It is also admitted that the notice to quit, signed by Wandesford and Wynne, and dated the 22nd of March 1849, was duly served on the defendant, and was on the face of it perfectly regular; and the only question raised is on the validity of that notice to determine the tenancy.

The objection taken is, that there was no evidence of a due authority to serve that notice. The Counsel for the defendant at the trial urged that objection, and called for a nonsuit, or the direction of a verdict for the defendant. The learned Judge was of opinion there was evidence of authority, but reserved the point, directing a verdict for the plaintiff. The defendant has obtained a conditional order for a nonsuit, or a verdict for him, and is entitled to sustain it if there was evidence of authority to serve

(a) 3 Ir. Law Rep. 146.

(c) 6 M. & W. 200.

(e) 4 T. R. 320.

(g) 3 Ir. Law Rep. 472.

(b) 4 Ir. Law Rep. 181.

(d) 5 Bing. 368.

(f) Batty, 643.

(h) 4 Scott, R. 396.

(i) 10 B. & C. 634.

the notice; but if there was any evidence to go to the jury, the verdict had for the plaintiff cannot be disturbed.

The facts are very few. Wandesford and Wynne are trustees, and the legal estate in the lands is vested in them as such. Thomas Wright was their general agent, and he proved the signature of the trustees to the notice to quit, and also proved that he had as such agent received the notice signed by the trustees in blank, and had at the same time received from them a bundle of similar notices signed in blank. He further proved that the notices when he received them were not filled up either with the name of the lands, or the name of the tenants; but it appeared from the evidence of his son that they were afterwards filled up in his father's office and sent out to be served. It was further proved that the defendant admitted the service, and did not object to the validity of the notice. There was no evidence of any specific authority to the agent to fill up and serve a notice on the defendant.

The question arises on the above state of facts, whether, taking all the circumstances together, there was evidence to go to the jury from whence they might infer an authority? I am of opinion there was such evidence.

The first point is, whether a parol authority would be sufficient. I think the cases decide that it would. In *Doe d. Kindersly v. Hughes* (a) the notice to quit was by an agent, signed by him as agent and describing him as such. The agent proved that he had received a parol direction from one of the lessors of the plaintiff, who were trustees, to serve a notice to quit in all cases where the premises were out of repair. It was objected that there was no evidence of an authority, but the point being reserved, the Court held the evidence to be sufficient. This case, I think, establishes two things—first, that a parol authority is sufficient; and secondly, that an authority is not necessary in the specific case, but that a general authority leaving it to the judgment and discretion of the agent to select is sufficient. In *Lessee Latouche v. Latimer*, reported in a note in 3 *Ir. Law Rep.* p. 158, it was decided that authority to sign a notice to quit need not be in writing, but may be by parol. In *Lessee*

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(a) 7 M. & W. 139.

E. T. 1851. *Lord Sligo v. Davitt*, though the agent proved that he had not any special authority to serve the notice to quit on the defendant, but proved that Lord Sligo had before the notice being served expressed a wish to get possession from the defendant, this was held to be evidence to go to the jury of an authority to serve the notice, and a verdict being had for the plaintiff, the Court refused to disturb it.

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In the present case Wright was the general agent of the estate; the lessors of the plaintiff were mere trustees, and though having the legal estate, had no personal interest in the lands. It was therefore likely that trustees would give a large discretion to the general agent. A large number of notices signed by the trustees, but not filled up, are sent to Wright the agent. I think it was a question for a jury to say, what was the purpose for which they were sent? If they were sent in order to be used and filled up as the agent might in his discretion see fit, that would be an authority to the agent. It appears plain that the agent considered he had authority to fill up and serve the notices, for they are filled up in his office and served accordingly. I think that the conduct of the trustees and agent, by the trustees sending the bundle of notices to the agent, and the agent acting on them, was evidence to go to a jury of general authority from the trustees to the agent to act on those notices as he thought fit. In addition to this, the ejectment founded on the notice is brought by the trustees, and though the bringing of the ejectment is not in itself sufficient evidence of authority, yet, conjoined with other facts, it may be, and in this case is, some evidence to show the purpose and object of their sending the bundle of notices.

On the whole, my opinion is that the cause should be allowed.

FERRIN, J.

In this case I do not see any evidence of a legal power in the agent to determine the tenancy. The defendant was a tenant from year to year to Wandesford and Wynne, who were trustees of the estate. It makes no difference whether they were owners in their own right or trustees; and if it did make any difference, it told against their transferring their authority by what I consider not to be a legal power. I think there is no evidence of a general legal

authority in the agent. There is no evidence of an authority to serve the notice in this particular case, nor is there any evidence, save the signature of the landlord, admittedly given on a blank notice, not stated how or upon what occasion it was given.

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Where a notice to quit is given by an agent, he should have authority at the time to do so. A mere agent has no implied authority to give a notice to quit. The tenant had a subsisting interest and term until that interest was determined by the will of the landlord, and by due notice of that will. The landlord may by the expression of his will determine the term when he duly notifies that intention. In case of a strict tenancy at will it determines by the expression of that will; in the case of a tenancy from year to year it determines on service of a notice to quit: *Co. Lit.* 55, a; *Com. Dig. Will*, H, 9. The landlord may not merely determine his will off the land, but he may appoint another to act for him; but I conceive he cannot give to another that power save by power of attorney. He may, no doubt, by parol authorise a party to give a particular notice, for by so doing he expresses his will, as in *Doe v. Hughes*. He may himself determine the tenancy by giving the notice, or he may direct another to serve it, but he must specify the person or class or description of persons on whom he exercises his will, or to whom he directs notice to be given. The giving a general authority to another person to determine an estate, is giving a power to another of acting for him, which must be by deed, to show that it has been properly pursued. So that it appears to me, this not being a merely ministerial act, but an exercise of a power to defeat a subsisting interest, which can only be done by the owner of the estate, or a person possessed of that power, there is no ground for holding that that power can be transferred by parol merely. I do not conceive this power can be deputed more than any other, save by power of attorney. It has been decided that a mere agent to receive rents has no authority to determine a tenancy; a receiver under the Court of Chancery has, because he derives his authority from that Court. The authorities on this subject are all collected in 1 *Saund.* 276, a. With respect to the case of *Latouche v. Latimer*, it is a mere note, and we have no means of knowing the

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facts thereof; and in the case of *Lord Sligo v. Davitt* it is difficult to say what was the precise question there decided. Since that the case of *Frewen v. Ahern* was decided, which was an ejectment founded on a notice to quit, signed by an agent and receiver; and Brady, C. B., there says:—"I take it to be now the settled law, "that in order to establish the validity of a notice to quit, given by "an agent, you must show that he had authority to give it at the "time it was served; or at all events, that his authority must be "recognised by some act of the landlord intervening between the "service of the notice and the bringing of the ejectment." That case clearly accords with the settled law, that a mere receiver of rent has no authority to determine a tenancy, but that to enable him to do so he must have authority for that purpose. It is admitted that he must; but then it is said that authority may be implied. In this way it may: that if the agent have authority to make leases, he may be held to have an authority to determine leases; but there is no case of a parol power to determine a lease. In the present case a number of blank notices were given to the agent, with the signature of the landlord attached to them for the purpose of convenience, to be used as occasion should require; and it would be going a great way to say that would authorise the agent to determine an estate of any one tenant without further direction.

I think there is no ground to infer the existence of a power to determine a lease from a direction to serve a notice to quit, because the service of the notice does not determine the estate, but the expression of the will; and the conveyance of the notice, that the lessor determined his will, is quite different from the exercise of the power. He may express his will on or off the lands. If done off the lands, it does not defeat the estate until notice be given, and that notice may be sent by parol or in writing; but here there is no evidence to lead to the conclusion that the agent had authority to determine the estate; in point of fact there is no evidence that he did so, for it was the son of the agent who filled up the notices, and there was no evidence that he did so by the direction of his father. That would show the inconvenience of holding this to be evidence of authority. Is that evidence of the intention of the land-

lord to do what was expressed or written in it? It appears to me it would be very inconvenient to hold that doctrine.

I therefore am of opinion that in this case there was not evidence sufficient to warrant a jury in finding for the plaintiff, and in fact that there was no evidence at all of authority, and therefore that this verdict should have been the other way, or the plaintiff should have been nonsuited.

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CRAMPTON, J.

There is some nicety in this question; but I do not think the defendant has succeeded in showing that he is entitled to a nonsuit. I think there was a question for the jury. I admit that a receiver, *quâ* receiver merely, has no power to determine a tenancy. He must have the landlord's authority so to do. But I hold that that authority need not be by warrant of attorney; it may be by writing, or it may be by parol. The case of *Lord Sligo v. Davitt* has decided that matter. The landlord might determine the tenancy by his personal signification of his will by a letter sent to the tenant, by a messenger whom he sent either with or without a letter, or by a written notice. The question upon this motion is, whether the notice to quit in this case was a sufficient notice to the tenant, or, in other words, whether it was the act of the landlord, and not merely the act of the agent Mr. Wright?

The case comes before the Court in this way:—The defendant was a yearly tenant, and was duly served with a notice to quit; that notice was signed by the landlord, and it was so signed before the ejectment was served. But it appeared upon cross-examination that the name of the tenant and the name of the lands were inserted by the agent after he had received the notice from his employer. The notice in question, with a sheaf of other notices of the same kind, was received by the agent, with the landlord's signature to it, but not filled up; and the question for the jury was, whether the agent had authority to serve this particular notice so filled up by him? I was called on to nonsuit, this I refused to do, because I thought there was some evidence to go to the jury, however slight, that the landlord had authorised the service of the notice, and I think so still. Now,

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I find the sending of this sheaf of notices, with the signature of the landlord affixed, partly printed, and partly in blank, was manifestly for the purpose of enabling the agent to serve such notices for the purpose of bringing ejectments against such tenants and lands as should be inserted in the notice by the agent; it was equivalent to saying "Serve these notices upon such of the tenants as are defaulters; fill up the blank for me;" and will not such a description of the tenant, though not named, be some evidence of authority given by the landlord? Secondly, there was no evidence that the landlord saw the notice after it was filled up; but is there not some evidence of his authorising it by his following it up by an ejectment brought by his (the landlord's) attorney? True, the mere bringing of an ejectment cannot validate a notice given without authority, but is it not some evidence to go to a jury that the landlord had authorised the notice, that he so acts upon it? It is slender evidence; but I think it is still evidence. Thirdly, the notice was served upon the lands, and the demand of possession was made from the tenant. He makes no objection but an unfounded one, viz., that the term of the expiration of the notice was not correctly stated in the notice. Mr. Wright was the general agent of the property, and to him the notices were transmitted by the landlord, and he appears to have dealt with this tenant as with the other tenants on the estate. Now, if this habit of dealing were known to the defendant, the defendant making no objection to the notice on the ground that it was the act of the landlord, was not immaterial to the case. Had I nonsuited, it would have been saying there was not a tittle of evidence to go to the jury. The later authorities, departing from the old rule of requiring a power of attorney to enable an agent to serve a notice to quit, are more convenient and more conformable to good sense than the ancient strictness. I think the cause shown should be allowed.

BLACKBURN, C. J.

The view I take of this question may be expressed in a few words. The point raised is, was there evidence to go to the jury of the act of the lessor of the plaintiff in the serving of this notice?

The act is not done, or professed to be done, in the name of the agent; but it is done in the name of the lessor of the plaintiffs themselves. At the trial when the notice was produced and read, it was a notice by which the plaintiffs themselves determined the tenancy; their names were to it; they were bound by it, and they could not retract from it, and so it was perfectly safe for the tenant to act on it. It was thus *prima facie* a case binding on both parties. But on the cross-examination of the plaintiffs' witness it is contended the act of the plaintiffs was invalidated, because it appeared when they signed the notice there were neither the names of the lands or of the parties in it. Was then the evidence of that document, looking to its import and the use made of it, to be entirely withdrawn from the jury? I think not; that skeleton notice to quit, transmitted to the agent, conferred an authority to serve the notice; it was sent to him indisputably for some purpose, and for what purpose no one could entertain a doubt. It was forwarded to the agent to be made perfect in all its details, and when perfected, to be used. I think a parol notice was sufficient; but it is not now necessary to debate that question; this is the act of the principal and agent, the evidence of which is furnished by the facts. I think therefore there was evidence to go to the jury.

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Cause allowed, without costs.

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Queen's Bench

THE WATERFORD, WEXFORD, WICKLOW AND
 DUBLIN RAILWAY COMPANY

v.

CLEMENT WOLSELY.

May 8, 10.

In an action for calls the plaintiffs gave in evidence the sealed registers of the Company, and in each of them the defendant's name appeared as the proprietor of "two hundred shares, £300 deposit paid;" they also proved their subscription contract, and that a person representing himself to be the defendant signed it. *Held*, in the absence of rebutting evidence, that thereby the defendant's liability was established.

DEBT for Railway calls.—The declaration stated that heretofore, to wit &c., the defendant was then and now is, at the place aforesaid, the holder of divers, to wit two hundred shares, in the Waterford, Wexford, &c., Railway Company, and was then and there, to wit on the 1st day of January 1850, at the place aforesaid, and still is, indebted to the said Company in the sum of £300, above demanded for divers, to wit two calls, upon each of the said two hundred shares of the defendant, one of the said calls being for the sum of ten shillings upon each of the said two hundred shares, duly made by the said Company, to wit on the 25th day of February 1847, at the place aforesaid, and one other of the said calls being for the sum of £1 sterling upon each of the said two hundred shares of the defendant, heretofore duly made by the Company, to wit on the 22nd day of December 1847, at the place aforesaid, whereby and by reason of the said sum of £300 being and remaining wholly unpaid to the Company, an action hath accrued to the said Company by virtue of a certain Act of Parliament made and passed in a session of Parliament holden in the eighth and ninth years of the reign of Queen Victoria, entitled "An Act for consolidating in one Act certain provisions usually inserted in Acts with respect to the constitution of Companies incorporated for carrying on undertakings of a public nature; and also by virtue of a certain Act of Parliament, made and passed in a session of Parliament holden in the ninth and tenth years of the reign of Queen Victoria, entitled 'An Act for making a Railway and Branch Railway, to be called the Waterford, Wexford, Wicklow and Dublin Railway,'" to demand and have of and from the defendant the sum of £300 above demanded; yet, &c.

The defendant pleaded the general issue.

The case was tried before the LORD CHIEF JUSTICE in the Hilary After-sittings. After the jury were sworn an objection was made by the defendant's Counsel to the trial being proceeded with, on the ground that the stamp on the record was invalid, the 13 & 14 Vic. c. 114, having abolished, from and after the 10th of October 1850, the existing stamp duties, and in the case of a *Nisi Prius* record requiring a £1 stamp to be affixed. There was no £1 stamp on the present record. The plaintiffs' Counsel stated that the record had been re-sealed by order of the CHIEF JUSTICE, and bore the old stamp of £3 on it, and required his Lordship, if he thought there was any thing in the objection, to allow the plaintiff to have the record re-stamped.

The CHIEF JUSTICE stated he would allow any latitude in his power on this objection, and suffer the record to be stamped *nunc pro tunc*.*

The trial was proceeded with, and the evidence was to this effect: The sealed register of the proprietors of the Company was produced, bearing date the 17th of February 1847, and an entry therefrom was read:—"Clement Wolsely two hundred shares, £300 deposit paid." A second register bearing date the 31st of August 1847 was also produced, and there defendant's name likewise appeared. A third register dated the 26th of February 1848, with a like entry, was also produced. The seal of the Company was affixed to each register, and was sworn to have been affixed on their respective dates. A minute-book of the transactions of the Directors of the Company was also produced, and an entry therefrom, dated the 20th of February 1847, read, directing that a call of ten shillings per share be made on the shares of the Company; and another entry, dated the 22nd of December 1847, also read, directing a call of £1

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* This case was ready for a trial in Trinity Term 1850, and was down in the list of the LORD CHIEF JUSTICE to be heard in the After-sittings of that Term; but an injunction having been obtained in England against the Directors of the Company, on the application of some of the shareholders the record was by consent withdrawn until the injunction was disposed of. It being ultimately dissolved, a new notice of trial was served, and hence the objection as to the stamp.

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per share, and each entry was signed by Lord Courtown as Chairman of the Company. Plaintiffs then produced a duplicate circular call note, and a witness proved that he posted a fac-simile of this note to the defendant by his address as it appeared in the register, and that it was posted through the London Post-office on the 11th of March 1847. The second call note was posted on the 19th of February 1848, in the same manner and to the same address. The subscription contract was produced, and it was sworn that a person representing himself as Clement Wolseley signed it on the 12th of August 1845.

Plaintiffs' having closed, the defendant's Counsel insisted the plaintiffs should be called, because that by the Special Act incorporating the Company the amount of capital to be subscribed was £2,000,000, and that the first call was made before this condition was complied with: 8 *Vis. c. 16, ss. 14, 22* (Companies Clauses Consolidation Act 1845). They cited *Company of Proprietors of the Norwich and Lowestoft Navigation v. Theobald (a)*, and *The Stratford and Moreton Railway Company v. Stratton (b)*, to show that the calls made were irregular. They further insisted that the second call having been made after the Company obtained their amended Act, the right of action was suspended, and they referred to 9 & 10 *Vis. c. 208* (Special Act), s. 21 (1846), providing that the powers of the Company shall not be exercised after the expiration of three years from the passing of the Act, and that the right of action, being once suspended, was extinguished. It was answered to these objections that the compulsory powers referred to in the statute had reference only to the taking of lands, and the CHIEF JUSTICE ultimately reserved the points for the defendant. The defendant's Counsel then addressed the jury, and called some witnesses to establish a case of fraud and delusion on the part of the Directors, that they never intended to complete the line, that they had actually abandoned a portion of it, and that names were put on the register by improper means, and they insisted that the abandonment of a great portion of the original line was an answer to the action; and on this they cited *Pitchford v. Davis (c)*.

(a) 1 Moo. & Malk. 151.

(b) 2 B. & Ad. 518.

(c) 5 M. & W. 2.

The CHIEF JUSTICE in charging the jury told them that the Company had complied to the letter with the Act of Parliament giving them the right to make calls, and that it lay on the defendant to prove that the signature to the parliamentary contract was not in his handwriting, and that it was for them to say if the defendant were personated, he having it in his power to satisfy the jury on this head. . He expressed his opinion there was no fraud in the operations of the Company, and that the question for the jury was, did the defendant sign the contract? The jury found for the plaintiffs.

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Evidence was given by the defendant as to some irregularity in affixing the seal to the register at the meeting of the Company; but as the Court abstained from deciding whether affixing the seal was or not a mere ministerial act, it becomes unnecessary to refer to it.

Then the defendant's Counsel made the following objections:— First, that by the first Special Act of Parliament two matters were to have been subscribed for; and it appearing there was no such subscription, the Directors or the Company had no power to exercise privileges conferred by the statute; that the call was made unauthorisedly; that the last subscription to the deed was the 4th of February 1846, and there was no subscription after the amended Act. Secondly, that the right of action once suspended is destroyed. Thirdly, that no notice of the call was given; and fourthly, that the subscription contract ought not to have been given in evidence. Fifthly, that if the jury believed the seal was fraudulently affixed to the register, they should find for the defendant. Sixthly, that in the absence of evidence that the defendant knew of and assented to the works being carried on with a smaller capital than that originally proposed, and in the absence of evidence of assent by the defendant, and change of time, or abridgment thereof, defendant could not be bound, and the jury should find for him. Seventhly, that his Lordship told the jury there was no evidence to go to them on the defence suggested. Eighthly, that his Lordship ought to have left it to the jury to say whether the meeting of the 17th of February 1847 was duly constituted a meeting of the Company, and whether the seal of the Company was legally affixed to the register.

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A rule *nisi* was obtained to set aside the verdict, and that a non-suit be entered on these several grounds, and that the action was not maintainable on the proofs adduced for the plaintiffs, or that the verdict be narrowed and confined to such of the calls as on the pleadings entitled the plaintiffs to recover; or that a new trial be had on the grounds of the reception of illegal evidence and the exclusion of legally admissible evidence, and for misdirection; and because the questions ought to have been submitted to the jury; or that the verdict be set aside on the objection to the improper stamp upon the record: and cause against that rule was now shown by—

Martley and T. O'Hagan (with them *M. Barry and Coffey*).

They relied on *South Eastern Railway Company v. Hebblewhite* (a); *The Midland Great Western Railway Company v. Burke* (b).

Macdonogh and J. D. Fitzgerald (with them *B. Johnstone*),
 contra.

The first of this Company's Acts, 9 & 10 Vic. c. 208, was passed on the 16th of July 1846, and the second on the 25th of June 1847. The first Act incorporates the general Acts with it, and by its 4th section the capital of this Company was to be £2,000,000. The 5th section divided this into one hundred thousand shares, and the 6th section states that £5 per share shall be the greatest amount of any one call which the Company may make on the shareholders, and there must be three months' notice of each call. The 21st section provides that the compulsory powers of the Company must be enforced within three years from the passing of the Act (1846). By the second special Act, 10 & 11 Vic. c. 61, the 3rd and 4th sections give the Directors power to abandon part of the line; and the 22nd section provides that the compulsory powers of the Act may be enforced before the whole capital is subscribed: *Wordsworth on Railways*, pp. 396, 403; *Company of Proprietors of the Norwich and Lowestoft Navigation v. Theobald* (c); *The Stratford and Moreton Railway Company v.*

(a) 2 Rail. Cas. 250; S. C. 4 P. & D. 246.

(b) 11 Ir. Law Rep. 267.

(c) 1 M. & Malk. 151.

Stratton (a); *The Waterford, Wexford, Wicklow and Dublin Railway Company v. Logan (b)*.

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O'Hagan replied, citing *Taylor on Evidence*, p. 1207; *The Southampton Dock Company v. Richards (c)*; *London and Brighton Railway Company v. Wilson (d)*.

BLACKBURN, C. J.

This is an action brought by the Waterford, Wexford, Wicklow and Dublin Railway Company to recover the amount of certain calls from the defendant, who is alleged to be the proprietor of two hundred shares in the Company. In order to maintain the action, it was necessary, under the Companies Clauses Act, for the plaintiffs to prove that the defendant, at the time of making the calls, was a holder of these shares; that these calls were duly made and notice of them given. That Act makes the production of the register of shareholders *prima facie* evidence of the person therein named being a shareholder, and of the number of his shares. Two of the requisites of the statute were clearly proved to have been complied with, and the sole question then was, has the defendant been shown to have been the proprietor of those shares? I was called on to nonsuit on the ground that he was not shown to be so; but I considered there was evidence upon which I should submit the case to the jury. The plaintiffs gave in evidence the subscription contract, and it was proved that a person of the same name as the defendant, on the 4th of February 1846, had paid £300 as a deposit on two hundred shares, and that he signed and sealed the instrument, but no proof was given to identify that person so signing with the defendant, the witness not having seen him do so. If the case stood on that evidence alone, it might be a different matter; but I was called on to nonsuit though there was additional evidence to go to the jury; there was first the register of shareholders of February 1847, by which it appeared the defendant was entered as the registered proprietor of these two hundred shares; that document established a *prima facie* case against the

(a) 2 B. & Ad. 518.

(b) 19 Law Jour. N. S. 259.

(c) 1 Man. & Gr. 448.
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(d) 6 Bing. N. Cas. 135.

E. T. 1851. defendant. Further, there were two other registers, one of August
Queen's Bench 1847, and another of February 1848, in which the same name was
 WATERFORD registered as the proprietor of the same two hundred shares. In that
 RAILWAY state of things I could not nonsuit, there being *prima facie* evidence
 v. to go to the jury that the defendant was the proprietor of those shares.
 WOLSELY. But then it was argued that I should, on various grounds, the force
 of which I could not discover, tell the jury there was fraud in the
 registry of 1847. I need not, however, advert to that argument,
 for I left the whole case to the jury, telling them I could not deduce
 a legal proposition establishing the fact of fraud; that, however is
 not now before the Court, and on that we intimate no opinion,
 because, confining ourselves to the question, whether or not there
 was evidence to go to the jury of the defendant being the proprietor
 of these shares, we think there was such evidence, and that the case
 was properly left to the jury.

CRAMPTON, J.

I concur. The defendant had no right to call for a nonsuit, because evidence was given, which, by the Companies Clauses Act, is *prima facie* evidence, and entitles the Company to maintain their action for calls. That *prima facie* evidence is conclusive evidence against the defendant if un rebutted, therefore a nonsuit was out of the question.

Then as to the granting the application for a new trial, there is no ground for it. This is an action for calls against a person alleged to be a shareholder, and in such an action the Act of Parliament prescribes the proofs that are to be made, viz., that he is a shareholder, that the calls were duly made, and that notice of the calls being made was duly given. Of the last two requisites there is no doubt but that they were complied with, and the sole question on the case of the plaintiffs that is open to the defendant is as to his being a shareholder. It became the question in the case, was he a shareholder? Then is it a condition precedent that, before the Company can sue for calls, the required capital has been duly subscribed for? That question however cannot in consistency arise when we look to the 27th and 28th sections of the Companies Clauses Act. The 27th section states the matters the plaintiff is

to prove in such an action as the present; and the 28th section says:—"The production of the register of shareholders shall be "*prima facie* evidence of such defendant being a shareholder, and "of the number and amount of his shares." The 27th section shows how the *prima facie* evidences may be displaced, that is, either by the call made exceeding the prescribed amount, or that due notice of the call was not given, or that the proper interval between two successive calls had not elapsed, or that calls amounting to more than the sum prescribed for the total amount of calls in one year had been made within that period.

The only question then, as I have said, was, whether the defendant was or was not a shareholder? The plaintiffs proved the subscription of the contract by a person having the same name as the defendant, and the execution of the subscription deed by the defendant, or one personating him, and a payment by that person of £300. If the deed of subscription stood alone, with no proof of handwriting, it is not now necessary to decide what would be its effect; but here identity was the sole matter to be established, and that identity, unencountered by any evidence of the defendant, is given in a satisfactory way by the registries.

We have the same name, the same number of shares, the same registry returned as in the subscription deed. If the first registry was fraudulent, this Court cannot deal with it; a Court of Equity may; therefore I offer no opinion as to that point, nor on the other point, as to whether the affixing of the seal to the register be a mere ministerial act or not. I therefore think the new trial must be refused, because, even if evidence of identity to connect the defendant with the subscription deed were wanting, it is abundantly supplied by the two registries subsequently made. I throw the first registry out of the case, and I rely on the other two, and they, with the subscription deed, furnish abundant evidence of identity. It is not to be presumed there were two persons of the same name, with the same number of shares, and the same amount of money paid. The question was one for the jury, and was properly left to them.

MOORE, J.,* concurred.

Cause allowed.

* PERRIN, J., was absent.

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WATERFORD
RAILWAY
v.
WOLSELY.

May 10.

A declaration for calls stated that the action had accrued to the Company by virtue of the Companies Clauses Act, "and also by virtue of a certain Act of Parliament," made and passed in the 9 and 10 Vic. The Company were incorporated under 9 & 10 Vic. c. 208, and subsequently obtained an amended Act, empowering them to abandon part of their undertaking. *Held*, on motion in arrest of judgment, that it was not necessary to specify the second Special Act in the declaration.

Quære, would such declaration be good on demurrer?

Macdonogh, on behalf of the defendant, moved that the judgment on the verdict obtained in this cause should be arrested on the following grounds:—That the declaration was neither a declaration according to the rules and principles of the Common Law or of the statutable enactments in that behalf; and that the statute passed in the tenth and eleventh years of her Majesty is not stated or pleaded in the declaration. The Companies Clauses Act supersedes the principles of the Common Law, and directs certain things to be stated in a declaration for calls, viz., that the defendant is the holder of the shares; that he owes so much money in respect of the calls, stating the number and amount, and that thereby an action hath accrued to the Company by virtue of that and the Special Act (8 Vic. c. 16, s. 26.) But there are two Special Acts incorporating this Company. If the pleader did not advert to the statute, the declaration would be bad on general demurrer. He has referred to the one Special Act, but not to the second; he should have said, and also by virtue of another Act, &c.: *Moore v. The Metropolitan Sewerage Manure Company (a)*; *The Newport, Abergavenny and Hereford Railway Company v. Hawes (b)*; *The Birkenhead, Lancashire and Cheshire Junction Railway Company v. Wilson (c)*. It is constantly done in practice to refer to an amalgamating Act; and here one call is on the pleadings made after the second Special Act passed.—[BLACKBURN, C. J. But that second Act does not at all allude to calls.]—But the forms usually adopted should be followed, and the amalgamating Act referred to: *Midland Great Western Railway Company of Ireland v. Evans (d)*; and then the sole question is, should the declaration refer to the Special Act, or the collection of Acts subsisting at the time of making the calls, or subsisting at the time of filing the declaration? If the paying up of the capital be a condition precedent, this declaration is bad.—[BLACKBURN, C. J. That is not open to you, for we have decided it on the new trial motion.]

Martley and O'Hagan, contra.

The 9 & 10 Vic. c. 208, is the incorporating Act of the Company,

(a) 3 Exch. 333.

(b) *Ibid*, 476.

(c) *Ibid*, 478.

(d) 4 Exch. 649.

and is the only one referring to the power to make calls. This declaration is in the precise form required by the Companies Clauses Act.—[CRAMPTON, J. There is no question but that if the second Act altered the constitution of the Company, it might have been necessary to specify it.]—Section 2 of the Companies Clauses Act says that “the Special Act” shall be construed to mean “any Act which shall be hereafter passed incorporating a Joint Stock Company for the purpose of carrying on any undertaking, and with which this Act shall be so incorporated as aforesaid.” The Lands Clauses Act says the Special Act shall be construed to mean “any Act which shall be hereafter passed, which shall authorise the taking of lands for the undertaking to which the same relates;” and the Railways Clauses Act says the Special Act shall mean “any Act which shall be hereafter passed, authorising the construction of a Railway;” thus in the three public Acts a different meaning is given to the words; and then the 26th section of 8 Vic., c. 16, says, it shall be enough to refer to that Act and the Special Act. This second Act of the Company is not the Special Act referred to by the 26th section. But if the objection made were a good one, it could only be taken advantage of on special demurrer: *Wordsworth on Joint Stock Companies*, p. 98; *Walford on Railways*, p. 350; *Aylesbury Railway Company v. Mount (a)*; *The King v. The Liverpool and Manchester Railway Company (b)*. The Companies Clauses Act does not say that the form there specified shall alone be used; it says it shall be “sufficient.” This motion must fail.

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Maedonogh replied.

BLACKBURN, C. J.

I have no doubt at all on this question. The action is one of debt for calls, the form of which is prescribed by the Companies Clauses Act; and the declaration following the requisites there enumerated says, “by virtue of the Companies Clauses Act (1845) and of the Special Act,” setting out the statute incorporating the Company. The motion must be refused, with costs.

(a) 4 M. & Gr. 651.

(b) 4 Ad. & El. 651.

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*Cychequer Chamber.**

REGISTRY APPEALS.†

FRANCIS O'BRIEN, *Appellant ;*
 RICHARD HAMILTON, *Respondent.*

June 4.

Where a registry appeal does not state the point of law relied on, or insufficiently states it, the case will be remitted to the Assistant-Barrister.

THIS was an appeal from the decision of Mr. Gorges (the Assistant-Barrister for the county Fermanagh), when presiding at the Registering Sessions for the borough of Enniskillen, on which occasion he held that the respondent was entitled to be registered as a voter for this borough.

The statement made by the Assistant-Barrister, in pursuance of the provisions of the Act of Parliament, was as follows:—

In this case the party claims to register out of a house in No. 28 Town-hall-street, Enniskillen, valued at £46. The facts are as follow:—

Richard Hamilton, nearly six years ago, took lodgings in the

* MONAHAN, C. J., TORRENS, J., CRAMPTON, J., FERRIN, J., BALL, J., and JACKSON, J., presiding.

† The appellate jurisdiction for hearing registry appeals is constituted by the 13 & 14 Vic. c. 69 (An Act to Amend the Laws which regulate the Qualification and Registration of Parliamentary Voters in Ireland), &c.

Section 58 provides, that it shall be lawful for any person who, under the provisions therein contained, shall have made any claim to have his name inserted on any list, or made any objection to any other person as not entitled to have his name inserted in any list, or whose name shall have been expunged from any list, and who in any such case shall be aggrieved by, or dissatisfied with, any decision of any Assistant-Barrister on any point of law material to the result of such case, either himself, or by some person on his behalf, to give to the Assistant-Barrister in Court, before the rising of the said Court, on the same day on which such decision shall have been pronounced, a notice in writing, that he is desirous to appeal, and in such notice shall shortly state the decision against which he desires to appeal; and the Assistant-Barrister thereupon, if he thinks it reasonable and proper that such appeal should be entertained, shall state in writing the facts which, according to his judgment, shall have been established by the evidence in

house from a Mr. Wilson; about three years ago he took the entire house at a rent of £35 a-year (except the shop and a small room off the passage) from the assignee of Mr. Wilson, a Mrs. Willis. The shop and small room were subsequently rented by a Mr. Greenfield from Mrs. Willis, and Mr. Hamilton paid the rent to Mr. Greenfield for Mrs. Willis. During the occupation of Mr. Greenfield, Mr. Hamilton permitted him to occupy part of the house as an accommodation, but received no rent for it. He also permitted his landlady to make money of an empty room by letting it during the regatta to a friend; Mr. Hamilton's rent remained the same. The room off the passage is used as a place of deposit for the books of a public library; it is accessible both by the hall-door and by a door out of the shop. Mr. Hamilton swore that he, and he alone, has had the entire control of, and exclusive right to, the hall-door, stair-

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the case, and which shall be material to the matter in question, and shall also state in writing his decision upon the whole case, and also his decision upon the point of law in question appealed against; and such statement shall be made as nearly as conveniently may be in like manner as is now usual in orders of refusal to register any claimant under the hereinbefore recited Act to amend the representation of the people of Ireland on any ground other than insufficiency of value; and the said Assistant-Barrister shall read the said statement to the appellant in open Court, and shall then and there sign the same; and the said appellant, or some one on his behalf, shall at the end of the said statement make a declaration in writing under his hand to the following effect, that is to say, "I appeal from this decision;" and the said Assistant-Barrister shall then indorse upon every such statement the name of the county and barony, or city, town or borough, to which the same shall relate, and also the Christian-name and surname and place of abode of the appellant and of the respondent in the said appeal, and shall sign and date such indorsement; and the said Assistant-Barrister shall deliver such statement, with such indorsement thereon, to the said appellant, to be by him transmitted to the Court of Exchequer Chamber at Dublin in the manner hereinafter mentioned; and the said Assistant-Barrister shall also deliver a copy of such statement, with the said indorsement thereon, to the respondent in such appeal who shall require the same.

Section 60 provides for the consolidation of appeals resting on the same point of law.

Section 74 provides that all appeals or matters of appeal from or in respect of any decision of any Assistant-Barrister entertained in manner thereinbefore mentioned shall be prosecuted, heard and determined in and by the Court of Exchequer Chamber at Dublin in such manner and form and subject to such rules and regulations as the said Court shall from time to time, by any rule or order made for regulating the practice and proceedings in such appeals, order and direct; provided always that at any sitting of the said Court of Exchequer Chamber the Chief Justices, Chief Baron, and other Justices and Barons of her Majesty's Superior Courts of Common Law at Dublin, or any three or more of them, shall for the purposes of this

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case and passage. The shop could be approached by a separate door of its own; but Mr. Hamilton used to permit the former occupant to use the passage in order to get in more easily by a side-door off the passage from the hall-door. He swore, however, that he always retained the key of the hall-door and had the sole control of the house, hall-door and premises, except the shop and room. Mr. Frith now occupies the shop, and has not been rated. Mr. Porter has the room as tenant to Frith, and has not been rated. The person rated on the books was Mr. Greenfield, and he paid the last rate for the entire house; but Mr. Hamilton caused a notice to be served on the Guardians to have his name placed on the rate-books as the occupier of the house, after he had served his notice of claim to be registered, and thereupon under the 110th section would be entitled, as

Act have all such jurisdiction, power and authority as by this Act given to the said Court of Exchequer Chamber;" any thing in 40 G. 3 (*Ir.*), "An Act for the more speedy Correction of Erroneous Judgments given in the Courts of Law in this Kingdom," or in any other Act or Acts contained, to the contrary notwithstanding.

Section 75 provides, that every appellant shall within the first four days in the Easter Term 1851 (as regards the registry for that year), and within the first four days in Michaelmas Term next after the decision to which such appeal shall relate, in every subsequent year, transmit to the Clerk of Errors in the said Court the statement in writing so signed by the Assistant-Barrister, and shall therewith send or give a notice signed by him, stating his intention to prosecute the appeal; and shall also send a like notice to the respondent, and the Clerk of Errors is to enter every appeal of which he has received due notice from the appellant in a book to be kept by him for that purpose.

Section 76 regulates the sittings of the Court, which are to be fixed by the respective Chief Justices or Chief Barons as soon as may be after the fourth day of every Michaelmas Term, and days are to be appointed either in Term or Vacation for hearing such appeals. Public notice to be given.

Section 78 provides, that no appeal or notice of appeal under this Act shall be received or allowed against any decision of any Assistant-Barrister upon any question of fact only, or upon the admissibility or effect of any evidence or admission adduced or made in any case to establish any matter of fact only; provided always that if the Court shall be of opinion in any case that the statement of the matter of appeal is not sufficient to enable them to give judgment in law, it shall be lawful for the said Court to remit the said statement to the Assistant-Barrister by whom it shall have been signed, in order that the case may be more fully stated.

Section 79—That every judgment or decision of the said Court of Exchequer Chamber shall be final and conclusive upon the point of law adjudicated upon, and shall be binding upon any Committee of the House of Commons appointed for the trial of any petition complaining of an undue election or return of any member or members to serve in Parliament.

I conceived, to be considered as such; the notice served was a notice to be registered out of the house.

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The objection made was, that a joint occupation arose out of the facts as stated, and that the 6th section of the Act applied; that the notice of claim having been for the house, he was bound by it, and inasmuch as there was a joint occupation said to be proved, that he could not register. I held the vote good, and that the 6th section did not apply, as Mr. Hamilton had by his notice under the 110th section entitled himself to be looked upon as the sole person liable for the rate.

J. Brooke and Sproule, for the appellant.

Hamilton served notice to be registered as the occupier of the entire house, though he had neither the shop nor the passage, and the Guardians properly refused his claim, for he was never in the occupation of the shop, nor was he lessee. Mr. Greenfield paid the entire rent, and was rated for the whole. It was relied on that the respondent came within the 110th section of the Act, providing, "that it shall be lawful for any person who shall occupy any lands, tenements or hereditaments rated under the Acts for the more effectual relief of the destitute poor in Ireland, at a net annual value of £12 or upwards, in any electoral division in any county, or £8 or upwards in any city, town or borough in Ireland in which there shall be a rate for the relief of the destitute poor, and whose name shall have been omitted from such rate, to present to the Guardians of the Union a claim to be rated in respect of such premises; and such claim shall be in writing and signed with his name; and upon such occupier so claiming, and actually paying or tendering the full amount of the rate or rates (if any) then due in respect of such premises, the Guardians of the Union shall insert the name of such occupier in such rate in respect of such premises as aforesaid; and in case such Guardians shall neglect or refuse so to do, such occupier shall, for the purposes of this Act, be deemed to have been rated in respect of such premises in the rate in respect of which he shall have claimed to be rated as aforesaid." It was contended below that the facts

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as proved showed a joint occupation, and that Hamilton's notice of claim being for the house, he could not register, and we relied on the 6th section of the statute, enacting :—" That when any lands, tenements or hereditaments as aforesaid, within any such city, town or borough, shall be jointly occupied by more persons than one as tenants or owners thereof, and such persons shall be rated in such rate as last aforesaid jointly in respect of such premises, each of such persons shall, subject to the conditions hereinbefore provided as to a person occupying lands, tenements or hereditaments in any such city, town or borough, be entitled to vote at any election of a member or members to serve in Parliament for the city, town or borough within which such premises are situate, in case the net annual value of such premises, as appearing on such rate when divided by the number of persons rated jointly in respect thereof, shall give a net annual value of £8 or upwards for each of such persons, but not otherwise."

J. Robinson, for the claimant.

By the 58th section of the Act giving the appeal, it shall be lawful for the Barrister to give his decision on the entire case on the point of law. It is impossible to know from his statement here what is the point of law, unless it be a question of joint occupation, and yet on the facts there is no case of joint occupation at all. The objection to his vote is that he was a joint occupier: *Score, Appellant; Huggett, Respondent (a); Simpson v. Wilkinson (b); Nuvir v. Denton (c)*. Even supposing there was a joint occupation, the notice of claim was perfectly correct: *Daniel v. Camplin (d)*.

Sproule replied.

The notice of claim was for a house, and by that the Barrister says he was bound. Under the old law, joint occupiers could not register. Now, by the 5th section of the statute "every male person of full age, and not subject to any legal incapacity, who shall occupy as tenant or owner, within any city, town or borough in

(a) 1 Bar. & Arnold's Election Cases, 335.

(b) 1 Lut. Reg. Cas. 176.

(c) Ibid, 183.

(d) Ibid, 204.

“Ireland returning a member or members to serve in Parliament, any lands, tenements or hereditaments, and shall be rated under the last rate for the time being, under 1 & 2 *Vic.* c. 56, or any Act or Acts amending the same, as occupier of such respective lands, tenements or hereditaments, at a net annual value of £8 or upwards, shall, if duly registered, &c., be entitled to vote at any election of a member or members to serve in Parliament for the city, town or borough within which such respective premises shall be situated, &c., provided that he shall have occupied the premises next before the 20th of July in any year, and shall before the 1st of July in such year have paid all poor-rates payable from him in respect of the premises previously to the 1st day of January in such year.”

So that to entitle a person to vote, he must be in occupation as tenant or owner, and have paid the poor-rates for the premises. But it might happen that the name was omitted from the list, and to remedy that the 110th section was framed.—[MONAHAN, C. J. The objection is not properly raised.]—Barristers are expressly excluded attending the Court of Revision, and the Court should not deal strictly with the informality of the objection.—[CRAMPTON, J. The objection is not tenable that a joint occupation arose from the state of facts, and you wish the Court to decide on a different question not on the record.]—If the objection be not properly taken, the Court, under the 78th section, may remit the case to the Assistant-Barrister.—[BALL, J. That section only applies where the statement of the matter of the appeal is not sufficient to enable the Court to give judgment in law; but here is matter amply sufficient to enable us to give judgment against the appellant.]—CRAMPTON, J. No appeal is given against the decision of the Barrister or against the facts, but on any point of law that may arise on the case.—MONAHAN, C. J. Suppose the Barrister had stated all the facts showing that the party was entitled to register, would the opposite party be entitled to say, I appeal against that decision?—JACKSON, J. The 79th section says every decision of the Court of Exchequer Chamber shall be final and conclusive in the case upon the point of law adjudicated upon; but what is the point of law here? I feel great difficulty in strictly construing these cases

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T. T. 1851. stated without the assistance of Counsel. Here there was strictly
Exch. Cham. no joint occupation, though popularly there was—MONAHAN, C. J.
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 tion to the vote?]

Robinson admitted he could not sustain the claim, as the notice was wrong.

MONAHAN, C. J.

This case comes before us by appeal upon a statement prepared by the Assistant-Barrister in pursuance of the provisions of the Act of Parliament. He is directed by the statute to state in writing his decision on the whole case, also his decision upon the point of law in question appealed against, and also to state the facts necessary for the adjudication of the appeal. In the present case he has stated the facts, but he also states evidence upon which he came to a particular conclusion; and we have found it utterly impossible to know, with any thing like certainty, what the point of law is. We therefore must remit the case to the Assistant-Barrister to know what is the point of law he wishes us to adjudicate upon.

ROBERT PHAYRE, *Appellant* ;
 M'DONEL, *Respondent*.

June 4.

The name of the claimant was *Robert Phayre*; the person rated in the Poor-law books as in occupation of the premises was the land-
 THIS was an appeal also against the decision of Mr. Gorges at the same Sessions. The facts stated were as follow :—

The name on the list in this case is *James Phayre*. No notice was served under the 110th section by claimant Robert Phayre. The person rated in the book is the landlord John M'Donel, and lord John M'Donel, and the name on the list was James Phayre. It was sworn there was no other person of the name of Phayre in the borough but Robert Phayre. Held, that the name of Robert Phayre not appearing on any list, and no notice of claim to register having been proved, the claimant was properly rejected.

Semble—The Assistant-Barrister has no power under the statute to alter a Christian-name in the list.

the rates are still due. The evidence of the Town-clerk was to the effect that he had never heard of Robert Phayre before, but that to his knowledge there was no one of the name of Phayre except claimant in Enniskillen, who, before his removal to Church-street, resided in High-street. The name of Robert Phayre not appearing on any list, and no notice of claim to register, or under the 110th section, having been proved, I decided against the vote, as I conceived I had no power under the 55th section in this case.

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Eccl. Cham.

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J. Robinson, for the appellant.

The question here is, whether under the 55th section of the statute the Assistant-Barrister had power to change the name of James on the list into Robert? That section empowers the Barrister to "correct any mistake which shall be proved to him to have been made in any list."—[BALL, J. But no evidence was given that James Phayre and Robert Phayre were one and the same person, nor any evidence that there was a mistake in the name.—PERRIN, J. Can the Barrister change a wrong Christian-name into a right one? Is that the mistake contemplated by the Act?—We say so, because of the large amending power given by the section. Then the 115th section says:—"No misnomer or inaccurate description of any person, "place or thing named or described in any schedule to this Act "annexed, or in any rate, list, or copy of register of voters, or in "any notice required by this Act, shall in anywise prevent or abridge "the operation of this Act with respect to such person, place or "thing, provided that such person, place or thing shall be so denominated in such schedule, rate, list, copy of register, or notice, as "to be commonly understood."—[CRAMPTON, J. What is the legal objection in this case?—It was said that the appellant had not given "due notice of his claim to be inserted in such list," as directed by the 53rd section, and that under the 55th section the Barrister had no power to put his name on the list.—[MONAHAN, C. J. That was inasmuch as the name of James Phayre appeared on the list, the Barrister said he could not entertain the claim of Robert Phayre, there being no notice of claim, and that consequently he had no jurisdiction under that 55th section.—PERRIN, J. I doubt if the

T. T. 1851. Barrister have power to alter a name on the list.—**CRAMPTON, J.**
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 The name of Robert Phayre is as expressly omitted from the list
 as if it were Robert Thomson.]—We say it is but a misnomer, and
 that it can be cured by the 115th section.—[**JACKSON, J.** Then
 you should have proved it was a misnomer.—**CRAMPTON, J.** There
 is no point of law here for the consideration of the Court.]

Brooke and Sproule, for the respondent, submitted he was entitled
 to his costs. Under the 53rd section of the Act the Court have
 power to “make such order respecting the payment of the costs of
 “any appeal, or of any part of such costs, as to the said Court shall
 “seem meet; provided always that it shall not be lawful for the said
 “Court in any case to make any order for costs against or in favour
 “of any respondent or person named as respondent as aforesaid,
 “unless he shall appear before the said Court in support of the
 “decision of the Assistant-Barrister in question.” Here a name
 was put on the list that should not have been done, and the Bar-
 rister rejected the claim.

MONAHAN, C. J.

We affirm the decision of the Barrister, but we do not think it a
 case for costs.

GILMORE AGNEW, *Appellant;*
PATRICK FOWLER, *Respondent.*

June 4.

The 13 & 14 Vic. c. 69, prescribes the time of holding Registry Sessions for 1851 between the 1st of January and 14th of February; the Assistant-Barrister signed the statement of facts and the appeal on the 15th of February; *Held*, that he had no jurisdiction, and that such appeal could not be entertained.

THIS was an appeal from the decision of Mr. John Gibson, Assist-
 ant-Barrister for the county of Antrim. The respondent was
 registered by the Barrister as a voter for the borough of Belfast.

The appeal was thus headed :—"No. 1.—Consolidated appeal of Patrick Fowler. T. T. 1851.
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"The decision in this case will rule the cases of the several persons following—[Setting out the names of fifteen persons.]

"Patrick Fowler, 146 North-street, having his qualification on the list at 146 North-street.

"In this case it appeared that in the last rate for the time being under the Poor-law the rating was in the name of '—— M'Corry' in respect of a house No. 146 North-street, of the net annual value of £8. It further appeared that the said Patrick Fowler occupied for more than twelve months previous to the 9th of November 1850, and still continued to occupy the same, and that he had paid all poor-rates due and payable in respect of said premises. It also appeared that a claim in proper form had been made by said Patrick Fowler, and served on the Guardians of the Poor on the 25th of November 1850, to be rated by name in respect of said house for the last rate for the time being. I retained the voters' names on the list, and held that they were properly rated.

"JOHN GIBSON."

"I appeal from this decision.

"I, for myself and on behalf of all the other persons who are interested as appellants in this matter, and whose names are hereunder written, do appeal against this decision, and agree to prosecute this appeal.

"GILMORE AGNEW."

"I, for myself and on behalf of all the other persons interested as respondents in this matter, and whose names are hereunder written, do agree to appear and answer this appeal.

"FRANCIS CAMPBELL.

"PATRICK FOWLER."

[Several other names were added.]

"Borough of Belfast.—Gilmore Agnew, of 52 Hercules-street, Belfast, appellant; Francis Campbell, 4 Hercules-place, Belfast, respondent.

"JOHN GIBSON."

"15th February 1851."

T. T. 1851. *Napier and Meade*, for the appellant.
Exch. Cham.

PATRICK
 FOWLER'S
 CASE.

Hutton, for the respondents, made a preliminary objection that these appeals were not warranted by the statute, because they were appeals from a decision of the Assistant-Barrister on the whole case, and not on any point of law; the facts of the case were stated, and fifteen names followed, and it did not appear whether these were appellants or respondents, and the signature of the Barrister was dated the 15th of February 1851. Further, it was objected that a single point of law is set out on the record, for the appeals were settled by the appellants themselves, and the Court has no jurisdiction to hear these appeals. Then it professes to be a consolidated appeal, and it is not; and the appeals were taken by the Barrister on the 15th of February, when his jurisdiction under the statute had wholly ceased. The 47th section enacts that the Barrister may hold Revising Sessions at any time between the 1st day of January and 14th day of February inclusive in the year 1851, and between the 8th day of September and 25th day of October inclusive in every succeeding year; and the 56th section has express negative words in it in reference to the Barrister adjourning his Court:—"So that no such adjourned Court shall be holden after the 14th day of February in the year 1851" as regards that year. The Barrister therefore had no power to do a single judicial act after the 14th of February.

Napier was called on.—[MONAHAN, C. J. Have we jurisdiction on this general form of appeal?—The Barrister has stated the facts of the case, and that he held the claimant's properly rateable; he has specified that Fowler made a claim, and he admitted it, and the appeal is against that decision, to the effect that Fowler is not properly rated.—[MONAHAN, C. J. No; the appeal is that Fowler is not on the list of voters.]—The rating is material to the franchise, and the Barrister is to decide on the right to appeal.—[CRAMP-
 TON, J. The appeal is given to assist the Barrister in his judgment; he is to state any case of law or any point of law that may arise, and this Court is then to deal with it.—MONAHAN, C. J. The Bar-

rister is to read the appeal in open Court before the parties; and the statute excluding him sitting beyond the 14th, how can his doing so on the 15th be justified?—What the Barrister does is this, he hears the claim, and decides the claimant should be on the list; that must be done in open Court. Then under the 58th section, having read the statement to the appellant in open Court, the Barrister is “then and there” to sign the same, that is, the first signature, and must have been affixed on the 14th of February. The appeal from the decision is then made; Fowler and others agree to appear and answer the appeal, and then the Barrister is to “indorse upon every such statement the name of the county and “barony or city, town or borough to which the same shall relate, “and also the Christian-name and surname and place of abode of “the appellant and of the respondent in the said appeal, and shall “sign and date such indorsement.” Every thing before that is done in open Court, and the indorsement is not a judicial act at all—[BALL, J. Why then is the Barrister to date it?—Appeals may be entered at any hour of the last day of the Court sitting, and if the Barrister sit, as here, until twelve o’clock, may he not after that add his signature?—[BALL, J. The statute says he cannot do it.]—Then that 58th section has reference but to a case of a single appeal; this is a consolidated appeal, and the signing the statement does not apply to a consolidated appeal. It is the 60th section which deals with consolidated appeals; and by it, if the Barrister see that any number of objections or claims depend on the same point of law, he is empowered to declare that such appeals ought to be consolidated, and he is to state in writing the case, and his decision thereon, as hereinbefore mentioned. This he could not do until the end of his session; for how is he to amalgamate all the points raised until the revision be over?—[BALL, J. The Barrister has not here stated this is not a consolidated appeal.—MONAHAN, C. J. All the things to be done by that 60th section must be cotemporaneous, and the words “hereinbefore mentioned” must mean “in open Court.” There is nothing to prevent the indorsement being put on a consolidated appeal.]—The memorandum and date are not

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T. T. 1851. at all necessary in the case of a consolidated appeal.—[PERRIN, J
Erch. Cham. The directions of the 60th section have not been followed.]

PATRICK
 FOWLER'S
 CASE.

MONAHAN, C. J.

The Court are of opinion they cannot entertain these appeals. As the objection made on the date is a fatal one, it is unnecessary to consider the other objections. We give no costs.

BEIRNE and several other persons, . . . *Appellants ;*
 THE CLERK OF THE PEACE, . . . *Respondent.*

June 4, 5.

A rate being struck in a Poor-law Union in October 1849, the Guardians divided it into instalments, and by printed notices the rate-payers were apprised thereof, and receipts and check-books were issued to the collectors for the first instalment. In September 1850 the collectors required the rate-payers to pay all rates payable to the 31st of March 1850, and the first instalment was accordingly paid. In November 1850 the Guardians directed the payment of the second instalment. *Held*, that the first instalment was the only rate payable on the 31st of March 1850, and that the non-payment of the second instalment on that day did not disqualify the rate-payers being registered.—[CRAMPTON, J., *dissentiente*.]

THIS was a consolidated appeal, on behalf of the appellant and ninety-six other persons, from the decision of Mr. D. R. Kane, Assistant-Barrister for the county of Leitrim, made by him at the Registering Sessions for that county.

It appeared from the case stated to the Court that the appellants were excluded by the Clerk of the Mohill Poor-law Union from the return made by him to the Clerk of the Peace of the county, of the occupiers of lands rated for the relief of the poor at the annual value of £12. That the appellants had served notice on the Clerk of the Peace, requiring to be inserted as rated occupiers; that they were occupiers as tenants of the lands, and rated for the poor-rate as such at the required annual value. That in the month of October 1849 paid Vice-guardians struck a rate chargeable on the electoral division of the union varying from eight shillings and two pence to five shillings and two pence in the pound, and had issued rate-books and warrants authorising the collection of these rates. That on the 1st of November 1849 these Guardians were succeeded by Local Guardians who represented the rates to the Poor-law Commissioners as excessive, and that they ought to be quashed; this the Commissioners refused to do, but recommended the Guardians to collect them by two instalments of five shillings and three pence when the

rate amounted to eight shillings, and so in proportion; that they accordingly divided the rates into instalments, and by printed notices circulated through the Union, apprised the rate-payers of such division, and issued receipts and check-books to the collectors for the collection of the first instalments only, the collectors retaining the warrants and rate-books delivered to them by the paid Guardians. That on the 2nd of November 1850, the Guardians for the first time directed the collection of the second instalment, and then issued receipt and check-books for the collection thereof, the collectors previous thereto not being required to collect the amount of the second instalment. That in September 1850 the collectors, by printed notices, circulated in their several electoral divisions, required the rate-payers to pay all rates payable to the 31st of March 1850. That fourteen of the rated occupiers paid their rates, and were returned by the Clerk of the Union in his return. That the rated occupiers, who had previously paid the first instalment in due time, offered to pay the second to the collector, but that the collectors refused to accept payment thereof, as no receipts had been issued to them by the Guardians for such instalment. The Clerk of the Union excluded the appellants from his return to the Clerk of the Peace, upon the ground that they had not paid the second instalment on or before the 30th of September 1850. That the appellants proved that they had respectively paid before the 30th of September 1850 the first instalment of the rate made in October 1849, and rested their claim to be retained on the list of votes on that ground, and insisted that this first instalment was the rate payable by them on the 31st of March 1850. The Barrister held that, having regard to the Acts, the whole rate made in October 1849 was payable on the 31st of March 1850, and that as the appellants only paid the first instalment, they were properly excluded from the return made by the Clerk of the Union, and he disallowed the claim on that ground; and he held on the evidence given by the appellants in relation to their claims that they were in all other respects entitled to their franchise, and admitted the claims of all persons in other respects qualified who offered to pay the second instalment on or before the 30th of September, and who had since paid said instalment when required so to do.

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R. W. Greene and Sir C. O'Loughlen, for the appellants.

The question in this case arises on the words in 13 & 14 *Vic.* c. 69, s. 5, "have paid all poor-rates in respect of such respective premises which shall have become payable from him in respect of such premises," &c. Section 14 has the same condition as to town voters. It is plain that before a person can be deprived of his franchise he must be guilty of some legal default. The word "*payable*" in that section, it will be argued, means assessed and due; we say it means "collectable" or enforceable, payable according to the course of collection when due.—[PERRIN, J. It was intended as a test of solvency.]—The statute is an enabling one, and to be construed liberally. The 23rd section provides for the Clerks of the Peace preparing lists of claimants, and if the Clerk of the Peace have reasonable cause to believe the claimant's name should not be on the list, he is to place the word "objected" before it. By schedule A No. 4, his list is to contain a return of male persons rated in the last rate under the Acts for the Relief of the Poor as occupiers of lands, &c., rated at the net annual value of £12 or upwards, excluding from this list "all such occupiers as have not on or before the 3rd day of September 1851 paid all poor-rates (if any) which have become payable by them respectively out of such respective lands, &c., previously to the 31st day of March 1851." In the precept of the Clerk of the Peace to the Clerk of the Union the latter is required to inquire of the union collector of poor-rates as to the occupier having paid all rates which shall have become payable by him. It is not an inquiry if a certain rate have been imposed merely. This is done in pursuance of the 19th section of 13 & 14 *Vic.* c. 69. If the qualification do not continue, "objected" or "dead" is to be put on the list, and the register is then to be returned to the Clerk of the Peace. Then by the 20th section, in every year after 1851, the Clerk of Unions is to transmit to the Clerk of the Peace supplemental lists of rated persons who have paid their poor-rates, and are not already on the register. The 30th section provides for the Town-clerks of boroughs publishing a notice stating that no person will be entitled to be registered unless all poor-rates which shall have become payable by him be paid on

or before a day specified. The 31st section empowers Town-clerks to inspect the rate-books and obtain a list of defaulters; and if required the poor-rate collector is to deliver to the Town-clerk such list. Then the 32nd section directs Clerks of Unions to transmit to the Town-clerk the list of persons rated as occupiers of premises of the required annual value, and therefrom by the 33rd section the Town-clerk is to make out annually the lists of persons entitled to vote. The 55th section prescribes the duties of the Barrister in revising lists, enabling him to correct misnomers or mistakes. When the Board of Guardians resolved on collecting the rate, they gave notice and supplied the collector with a receipt book. That only authorised him to receive one rate, and so the collector refused to receive the second rate until he got a second receipt book. The rate is to be paid to the collector by the actual occupier; and in *Moore's Compendium of the Poor-law*, pp. 403, 420, 3rd ed., under article 49, the power of Boards of Guardians to take the rate by instalments is impliedly sanctioned.—[TORRENS, J. Not to levy the rate by instalments, but to vary the rate as they may think judicious.]—The poor-rate is not payable till there be a person legally authorised to receive the same. "Payable" and "receivable" are correlative terms; and by 13 & 14 Vic. c. 69, s. 109, the collector or his deputy is to attend at some place in each barony within the Union, of which he is to give notice, for the purpose of giving receipts for poor-rates to any person requiring the same, and paying the amount of poor-rate then payable by them; clearly showing the rate is not payable until there be a person authorised to receive the same. The distinction between what is payable and what is due is shown by 1 & 2 Vic. c. 56, s. 85. The collectors have no power to collect any part of the rate from a particular person: 12 & 13 Vic. c. 91, ss. 48, 51, 52, 53. There was no other rate payable here except the one for which the collector could give a receipt. The rate is due and perhaps payable the moment it is struck; but in point of fact it is not payable till it be put in force by the collector. No person is entitled to receive the rate until he get the warrant and the receipt book.

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Napier and C. Andrews, contra.

The construction contended for would empower the Guardians to take away the franchise by giving them the power of distributing the rates. An arrangement by the Guardians to take the rate by instalments cannot alter the legal liability of the party to pay the entire, which commences when the rate was made. The accepting of it by instalments was a mere act of kindness by the Guardians. The 78th section of the Poor-law Act (1 & 2 Vic. c. 56) authorises a distress to be made within two months after the rate is made, clearly showing that from the time it is made it is payable. The 71st section says that the rate shall be paid by the person in occupation when the rate was made; and the 73rd section authorises the Guardians to issue warrants for the collection; and in this case the warrants had been issued to the collectors; and the 76th section provides that the entire rate is to be deducted from the tithe—in fact, for all purposes of legal liability, when the rate is made it is payable. The 109th section of 13 & 14 Vic. c. 69, directs the collector to attend and give a receipt for the amount then payable, that is legally capable of being enforced: *Rex v. Inhabitants of Fordham (a)*.

Cur. ad. vult.

MONAHAN, C. J.

The act here done was by the Guardians regularly assembled. Notices were served apprising the rate-payers; and the only question is, had the collectors, not having got the receipts for the second moiety of the rate, a power to receive it? It is my opinion, and that of the majority of the Court, that this was not a rate payable within the provisions of the Act of Parliament on the 31st of March last, and that therefore these parties are entitled to register.

CRAMPTON, J.

I have the misfortune to differ from the opinion of the Court, and I think the Assistant-Barrister took the correct view.

MONAHAN, C. J.

There must be an order to put these names on the register.

(a) 4 Jur. 218.

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Court of Criminal Appeal.*

THE QUEEN,

At the Prosecution of EDWARD DEANE FREEMAN,

v.

WILLIAM PIGOTT and others.

June 4.

THE following case was submitted for the opinion of this Court by Mr. Berwick, Assistant-Barrister for the East Riding of the county of Cork:—

The traversers were tried at the last Quarter Sessions for the East Riding of the county of Cork, holden at Fermoy, on an indictment charging them with the rescue, on the 9th of September 1850, of certain goods seized for county rates, due out of the townland of Corbally, in the barony of Fermoy, of part of which William Mahony and Robert Hayes, two of the traversers, were and had been at the time the rates claimed became due in the occupation as tenants.

It appeared in evidence that on the 8th of September 1848, the Treasurer of the county of Cork issued to the prosecutor Edward Deane Freeman his warrant of that date for the collection of the county rates of the barony of Fermoy, presented at the Summer Assizes of 1848. Mr. Freeman was then, and had acted for many years before as, the barony constable, duly appointed as collector for that barony. Another collector was appointed by the Grand Jury at the Summer Assizes of 1849, for the collection of the presentments of that Assizes, Mr. Freeman having, in consequence of the difficulty of collection, declined to act for the levy of that or any

The traversers were indicted for a rescue of goods seized for county rates due out of a townland, of part of which two of the traversers were, at the time the rates became due, in the occupation as tenants. No applotment of county cess had been made on the occupiers under 6 & 7 W. 4, c. 116, s. 151, and no account in writing, as directed by that section, had been served on the churchwardens or Seneschal of the parish; but a voluntary applotment was made, and an arrear accruing, the collec-

tors distrained on the townland for the arrear, selecting the party by whose default the deficiency appeared to arise, namely, two of the traversers. The goods seized were left on the lands until the sale day, when they were rescued by the traversers and others. *Held*, that such seizure was illegal, and that the traversers were justified in resisting the sale, as under 6 & 7 W. 4, c. 116, s. 151, the barony constable had no authority to levy county cess until he had delivered to the churchwarden or Seneschal an account in writing as directed by that section, and that therefore the conviction of the traversers for a rescue was bad.

6 & 7 W. 4, c. 116, has repealed 35 G. 3, c. 55.

* *Coram*—MONAHAN, C. J. ; TORRENS, J. ; CRAMPTON, J. ; PERRIN, J. ; BALL, J., and JACKSON, J.

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future Assizes. He continued, however, to collect from the cess-payers of the different townlands named in his warrant the amount remaining due thereout for the cess of the Summer Assizes of 1848. So far as it appeared, no applotment of county cess had ever been made under the provisions of the 151st section of 6 & 7 W. 4, c. 116, on the occupiers of the townlands contained in Mr. Freeman's warrant of the barony of Fermoy, and no account in writing, as directed by that section, had been served by Mr. Freeman, after he had received the warrants, on the Seneschal or churchwardens of the parish in which the lands in question were situate, nor had he been ever required so to do by any two landholders. In fact, it appeared that the course pursued by Mr. Freeman was to hand to some responsible inhabitant of each townland a statement of the whole amount applotted on that townland; and this was divided among the occupiers, who generally paid according thereto; and in case of non-payment of any part of the rate, the collectors distrained on the townland for the arrear, selecting, however, in general the party by whose default the deficiency appeared to arise.

In consequence of an arrear of county cess for the levy of Summer Assizes of 1848 remaining still unpaid out of the townland in which the farm of the traversers Mahony and Hayes was situate, Mr. Freeman's deputy, whose deputation was signed on the 27th of September 1849, made a seizure of certain corn in stack on the 4th of September 1850 on the traverser's land for that arrear; his right to do so does not appear to have been then disputed, and the goods seized were left on the lands until the sale day, which was appointed for the 9th of September, and notice to that effect given. On the 9th of September, however, when Mr. Freeman's deputy and his bailiff went to the land to conduct the sale, they were resisted, and the property rescued with considerable violence, by the traversers, accompanied by a large body of people, who plainly attended there for the purpose of assisting in the rescue. At the close of the prosecutor's case I asked whether the indictment contained a count for riot, and I was informed that it did not; but on examining the copy of the indictment this was found to be a mistake. The trial, however, proceeded exclusively on the count for

rescue, and no other charge was stated to the Court or submitted to the jury; and it was to that charge alone that the defence of the traversers was made, and on that the opinion of the Court was taken, and the verdict given.

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For the traversers it was alleged that the property had been illegally seized, and therefore that they were justified in law in hindering the sale and rescuing it, on the following grounds:—

First, that under the 151st section of the Grand Jury Act the barony constable had no authority by law in any case to levy county cess till he had “delivered or sent to the Seneschal or churchwardens of the townland contained in his warrant an account in writing,” according to the directions of that section of the Act; and it was argued that the words “if he shall be required so to do by any two landholders” only applied to the case of a parish or townland of which there was no Seneschal or churchwardens, and not to any other case, and that the service of such notice by the collector, or in the case of a parish or denomination in which there were churchwardens (and it was admitted that such was the present case), was a condition precedent to his right to levy or collect the county rate. It was however urged by the prosecutor, that the Legislature merely intended by this provision to give to the inhabitants of each parish or townland who wished for a new applotment the power in all cases to require the collectors to furnish such account, and not to throw that duty in the first instance on the barony constable, when perhaps it was not required or wished for.

Secondly, it was argued that even though this was so, yet it lay upon the prosecutor to show some previous applotment according to which this levy was made, and that if no previous applotment existed he had no right to collect the county cess, at least by distress, there being no analogous power given by 6 & 7 W. 4 to that in 36 G. 3, c. 55, s. 53, which enabled the collector to distrain for the county cess on the whole or any part of the townland if no applotment was made. To this it was answered that as no previous legal appointment appeared to have been ever made, the 36 G. 3 was not in this respect repealed by 6 & 7 W. 4, and that in such case the right of the collector to resort to the whole townland was preserved.

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Thirdly, it was argued that as Mr. Freeman had ceased to be the collector of the county cess by the nomination of another collector at the Summer Assizes of 1849, his right to collect the county cess for the summer levy of 1848 had wholly ceased, and that the distress should have been made, if at all legal, in the name of, and by, the new collector. The answer given to this was, that as the warrant was expressly declared by the 149th section to remain in full force and effect for the term of two years from its date, notwithstanding the resignation or removal of the collector, and as it was expressly directed to Mr. Freeman by name, the distress could alone be made and justified in his name.

Fourthly.—It was then argued that even though the warrant was in existence as a legal warrant, and the distress in the name of Mr. Freeman was proper, yet in fact it should have been made by the present barony collector, and that the deputy by whom the distress was made should have been appointed by him and not by Mr. Freeman, whose power to appoint a deputy had ceased the moment a new collector had been appointed. It was urged, however, on the part of the prosecutor that as Mr. Freeman had entered into a bond with sureties to collect the whole rate, which remained in full force, and as the warrant then in his hands had originally clothed him with the authority of a collector for a particular cess, and had not been withdrawn by the grand jury, nor had any other collector been appointed to collect that particular cess, which was admitted to have remained unpaid, his power to collect that particular rate did not cease until the warrant itself expired, which did not take place until after the seizure was made.

Fifthly.—It was lastly urged, that though Mr. Freeman had the right to distrain on the 4th of September 1850 for the cess then remaining due, yet that his warrant having expired on the 8th of September 1850, neither he nor his deputy had any right to sell on the 9th of September, being the day after the warrant had expired. The answer given to this was, that the seizure having been originally legal, and the sale of a distress made for county cess being warranted and required by law, all the acts necessary to complete the original legal act were justified, provided they were

done in the ordinary course of such proceedings; and as it appeared that the day to which the sale was adjourned in this case was the usual interval allowed in cases of sales of distress made for county rates, and that the delay was neither unreasonable nor for the purpose of annoyance, the sale was justified.

It was agreed that the different points thus made should be reserved for the opinion of your Lordship; and accordingly I told the jury, that if they believed the evidence, they should find the prisoners guilty of the rescue charged, it being arranged that they should have the benefit of all the above objections in a case saved for your Lordship's consideration.

The jury found the prisoners guilty, and judgment was postponed, and the prisoners were liberated on bail for their appearance, at the next or some subsequent Court of Quarter Sessions, to receive judgment or final order of the Court, and the foregoing case is now respectfully submitted for the consideration of your Lordship. No verdict was taken on the count for riot, for the reasons I have before stated.

WALTER BERWICK,

Chairman of Quarter Sessions for the East Riding of the county of Cork.

The question for the Court was, "whether, under the circumstances of the case, the conviction of William Pigott and others for a rescue was a good conviction?"

Meagher appeared in support of the objections to the conviction.

It appears that at no period during the time Mr. Freeman acted as collector, did he transmit the account of the sum he was to levy as required by the 6 & 7 W. 4, c. 116, s. 151; nor was any applotment ever made; and inasmuch as no applotment was made, and no step taken by the collector to make it, he could not distrain for the amount.—[MONAHAN, C. J. The question before the Barrister was, whether there was a rescue or not, independent of the assault?—That 151st section says:—"Every person authorised to collect and receive Grand Jury cess shall, within ten days after he shall have received the Treasurer's warrant empowering him to collect

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"and receive the same, deliver or send to the Seneschal or church-wardens of each manor, parish or denomination of land, contained in such warrant; or in case there be no Seneschal or church-warden of the same, then to any principal residing inhabitant, if he shall be required so to do by any two landholders of any such manor, parish, &c.; or if he shall deem it necessary so to do, an account in writing, signed by himself, of the sum he is required by the said warrant to levy upon the said manor, &c., and to desire that the said sum may be apportioned thereon; and every person who shall receive such account, is required " under a penalty of £10 recoverable by civil-bill, "to post up, within six days after the receipt thereof, on the door of the church or the usual place for posting notices in the said manor, parish, &c., a notice signed by himself, setting forth that the landholders or inhabitants of (name manor, parish, &c.), are hereby required to meet at (place of meeting), on the day of (a day not less than ten days or more than twenty from the date of such notice), to choose two or more persons to apportion the sum of (sum required), required to be levied upon such manor, &c., by the Treasurer of the county; and at such meeting the landholders and inhabitants present shall choose two or more persons to be apportioners, who shall, within thirty days from the term they shall be so chosen, apportion the sum so to be levied upon such manor, &c., fairly and justly according to the relative annual value of the several subdivisions of the lands and tenements therein contained, stating as accurately as they can the name of the occupier of each portion of such lands, and shall make oath before any Justice of the Peace for such county that they have made the said apportionment justly, according to the best of their skill, without favour, affection or malice, the jurat of which oath shall be indorsed on the apportionment" (the apportioners to deliver the apportionment, verified on oath, to the collector, under a penalty of ten shillings a-day for every day's delay after the thirty days, recoverable by civil-bill); "and the collector, on receiving such full and sufficient apportionment, is required and authorised to levy the said money according thereto; and in case no full and sufficient apportionment shall be returned within thirty-six days after

“the time fixed for the applotment of the applotters, then it shall be lawful for such collector to levy the full sum required by the Treasurer’s warrant off such manor, &c., according to or in the like proportions as the sum levied under the last previous applotment of such manor, &c., or according to the rate or applotment pursuant to which it was levied.” The old mode of applotment was under 36 *G. 3*, c. 55, s. 53. The warrant that issued in this case contains the townlands on which the cess is applotted. If the collector had furnished the notice of the portion of cess payable by each parish, and it had been refused, he might have entered and distrained under that 36 *G. 3*; but by the 6 & 7 *W. 4* the collector’s duty is modified, and he cannot distrain on one occupier for what is due by another.—[CRAMPTON, J. Is not this provision of the statute directory, not imperative?]—Directory as to the time: *Regina v. Ormsby* (a).—[MONAHAN, C. J. Until the collector knew the sum that is to be applotted, he could not distrain.]—So we contend; the 152nd section of 6 & 7 *W. 4* gives the power of distress to the collector as soon as he shall have received the applotment of the cess, if it be not paid; and in this case no right of distress can be maintained except within the provisions of this Act of Parliament. That right of distress is co-extensive with the liability, and can be exercised only when the applotment has been received. It is the collector’s duty, on receiving the warrant, to send the notice required by the 151st section.—[MONAHAN, C. J. If required by two inhabitants or landholders.]—It is his duty when there is no Seneschal or churchwarden.—[CRAMPTON, J. If no applotment were made under that 151st section, preparatory to the demand of the collector, he would collect according to the previous applotment: but in this case he seems to have handed over the whole amount to be applotted to the inhabitants, and they voluntarily applotted it amongst themselves.]—Applotment does not mean any conventional arrangement among the parishioners.—[TORRENS, J. If, however, any one disputed that conventional arrangement, which has been the mode of assessing for years, it would upset the entire collection of cess throughout the kingdom.—

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(a) 1 J. & Sy. 52.

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JACKSON, J. The last clause of the 151st section seems to sanction a conventional arrangement if no applotment were made.—CRAMP-
 TON, J. The distress here made on this particular tenant was for the entire arrear of the parish.]—It could never be contemplated by the Legislature that a tenant of four or five acres could be summoned before a Magistrate to pay for the whole townland; and yet that would necessarily follow, for the 152nd section provides, if the collector do not distrain, he is to leave at the dwelling-house of the party a notice requiring payment of the sum applotted, and if not paid within six days, then the collector may prefer a complaint to a Justice of the Peace for the county.

The 153rd section makes Grand Jury cess a charge on the lands and premises mentioned in the applotment, and when the sum payable by any one person does not exceed £50 it may be recovered by civil bill.

The occupier we say is liable for his own cess, but not for cess due out of and chargeable on another man's land.

Smyly appeared for the Crown, and *J. D. Fitzgerald*, for the collector.

The argument has been on what took place on the day of seizure, and not on the day of sale; the goods seized were in the collector's possession, rightfully or wrongfully, and the traverser was not entitled to rescue them. The conviction before the Court states them to have been in his custody lawfully on that day.—[PERRIN, J. How can you indict a man for resisting an illegal distress?—If the distress be illegal, he has his remedy by civil action, but he has no right to make an illegal assertion of his property.—[MONAHAN, C. J. If a man be distrained and no rent due by him, is he not entitled to rescue his goods?—We submit he cannot thus summarily take his goods out of the possession of another, into whose custody they have come by virtue of a legal warrant; he has no right to take the goods by force: *Anonymous* (a). There has been a regular applotment here, and 6 & 7 W. 4 does not entirely repeal the statute 35 G. 3; it leaves those cases not provided for as

(a) 3 Salk. 187

they were under the old statute.—[MONAHAN. C. J. Even under that old statute, if there was no applotment, would you have a right to distrain?—BALL, J. But the 1st section of 6 & 7 W. 4 repeals the statute of 36 G. 3.]—Presentments for the future are to be under 6 & 7 W. 4; but 36 G. 3 deals with other matters than presentments, and so far it is not repealed; if there be no express repeal of the former Act, it can be but by implication that the provisions of the two are conflicting.—[CRAMPTON, J. The one statute is clearly repealed by the other, and your case on that must fail.]

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It is considered, adjudged and determined, that the said William Pigott, &c., were not, nor was any of them, properly convicted upon said indictment; and that the said William Pigott, &c., should not, nor should any of them, receive judgment upon the said indictment, but that they and each of them should be discharged from the premises in said indictment specified.

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Exchequer.

Lessee BROWN v. WALSH.*

(Exchequer.)

Jan. 20.

An attorney who allowed himself to be made a party to a transaction whereby an action was compromised behind the back of defendant's attorney, and thereby deprived him of the chance of his costs against the plaintiff, which he had by reason of a point saved at the trial, made personally answerable to defendant's attorney for his costs.

MEAGHER moved, on behalf of Mr. Kenny, the defendant's attorney, to set aside a side-bar rule of the 9th of January 1851, by which the conditional order of the 26th of November last had been discharged, and that said conditional order should be made absolute. The conditional order was, that George Walton's attorney should pay the sum of £15. 8s., taxed costs, to Michael Kenny, unless cause.

The principal question discussed was, whether the conditional order should be made absolute? The grounds on which the question turned appear in the judgment.

Counsel for Mr. Kenny cited *Merryfield on Attornies*, p. 65; *Anonymous* (a), to show that an attorney cannot be changed without first being paid his costs.

J. D. Fitzgerald contended that the parties were entitled to settle the action without the concurrence of their attorneys, and relied on the observation of Parke, B., in a case not cited, "that parties may settle actions behind the back of attorneys, as it is the client's action, not the attorney's." Also that the defendant being merely a party put forward by the attorney Kenny, that the plaintiff's attorney was justified in acting as he had done on behalf of his client.—[LEFROY, B. The answer attempted to be given to this application is, that although Mr. Walton, the attorney for the plaintiff, has been a party to an unwarrantable proceeding, still that was done to meet something fraudulent on the other side. No Court of Justice can for a motion sanction such an excuse. Fraud

(a) 3 Law Rec. O. S. 290.

* LEFROY, B., *solus*.

on one side is no excuse for fraud on the other. What are the facts? An ejectment for non-payment of rent was brought by a Mrs. Brown, and defence was taken by a person named Walsh, he being merely a nominal defendant, and in reality a trustee for a defendant, who was an infant. An attorney was employed for him, and the ejectment having been tried, a verdict was found for the lessor of the plaintiff, subject to a point saved, of which the defendant was entitled to have the benefit. To get rid of that point, it appears that the attorney for the lessor of the plaintiff agreed to give the defendant upon the record £5, he consenting to change his attorney Mr. Kenny and appoint a Mr. Walton, which was done by rule for the purpose, and by the same arrangement the new attorney Walton gave a consent for judgment to the lessor of the plaintiff, and abandoned the point saved. It was avowed and admitted that the attorney Walton was the person who carried out the arrangement.]—I did not avow the transaction took place with Mr. Walton, for the matter was arranged by Mr. Spaight, the agent of the lessor of the plaintiff.

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Exchequer.
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 WALSH.

Meagher.

The clerk of the attorney was a party to the procuring of the consent.

LEFROY, B.

It is clear that Walton was the person to carry out the plan by which the defendant was to be deprived of the benefit of the point saved at the trial, and his attorney to be deprived of his costs, for he could not have been changed by a rule for that purpose without provision being made to secure him his costs. Under those circumstances his costs should be paid, not only because the proceedings were a fraud upon his lien, but also because he was entitled to the benefit of the point saved; and if this defendant succeeded on the point saved, and got the judgment of the Court, his attorney would be entitled to his costs as against the other side. The answer attempted in reply to the application, that the defendant was set up, is collateral; it might have been a ground for coming

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to the Court; and then on investigation, it might have failed, or may have been a ground for making him give security for costs. I have no difficulty in making the order that Mr. Walton shall pay the costs of the attorney, for the Court cannot sanction the proceedings which have been resorted to to get rid of the objection taken at the trial.

ORDER.—That the said side-bar rule be, and the same is, hereby set aside, and that the conditional order be made absolute; and accordingly that the said George Walton do pay to the said Michael Kenny the sum of £15. 8s., the amount of the taxed costs under the order in this cause of the 1st of August last; and that the said George Walton do also pay to the said Michael Kenny the costs of the said conditional order of the 26th of November last, when taxed and ascertained; but no costs to either party of the said side-bar rule, or of this motion.

KENYON v. LINDSAY.

Jan. 24.

In an action for diverting a water-course a judgment by default set aside, the defendant undertaking to let the stream flow pending the action, and without prejudice to it, as it did at the time of the diversion.

J. CLARKE moved to set aside the interlocutory judgment obtained in this case. The judgment was obtained by a slip. Under the old practice two rules were entered—an eight-day and four-day rule. By the 55th of the New General Orders of the 23rd of December last an eight-day rule alone is entered.

The action was trespass on the case, for diverting a water-course. It appeared from the affidavit that it was essential for the preparation of a plea that a map should be procured for Counsel; that owing to the inclemency of the weather delay had occurred in procuring it. On those grounds, independent of the oversight as to the change of practice, there was a case for indulgence.

Counsel also contended that as there would be a writ of inquiry,

and thereupon in fact a trial, that the judgment should be set aside.— H. T. 1851.
[LEFROY, B. Have you an affidavit of merits?]
The defendant states “he is satisfied, and convinced he has a good defence;” and though there is a case deciding such an affidavit to be insufficient, still the rule is one that should not prevail, as a conscientious man in a complicated case cannot swear positively. The plaintiff, unless the judgment be set aside, will go on; and even though beaten substantially on the writ of inquiry, will have all the costs. The judgment will also preclude the right.—[LEFROY, B. That is what I am pressed with; but I am of opinion that if you went into a Court of Equity for an injunction, that accidental judgment would determine nothing. Will the defendant undertake now to let the water flow pending the action as it heretofore flowed?]
—Counsel assented for defendant.

Eschequer.
KENYON
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J. D. Fitzgerald, for plaintiff.

Defendant must also pay the costs of the judgment and the costs of the motion.

LEFROY, B.

Take the order, on payment of the costs of the judgment and of the motion, and also undertaking to allow the stream of water, for the diversion of which this action has been brought, to flow pending this action, and without prejudice thereto, as it did flow in the year 1849, that being the alleged period of the diversion.

H. T. 1851.

Exchequer.

Executors of GEORGE DODWELL

v.

Heir and Terretenants of EDWARD CARROLL.

Jan. 25.

Where service of *sci. fa.* cannot be effected in conformity with the 171st New General Order, the party may apply either to have service deemed good, or to substitute.

ROBINSON moved for liberty to issue a *sci. fa.* to revive a judgment against the heir and terretenants of Edward Carroll; and stated that under the 171st New General Order there was some difficulty as to the service of a party where the mode of service prescribed by the Rule cannot be effected—whether the course should be to obtain an order to substitute, or to make the best service in the party's power, and apply to have it deemed good.

LEFROY, B.

I think the party may take either course; and as the affidavit here is sufficient, I will now make the order.

Let the plaintiff be at liberty to issue a *sci. fa.* to revive the judgment, and let service of said *sci. fa.* on Thomas Martin, attorney and land agent of John Carroll, heir-at-law of Edward Carroll, be deemed good service of said *sci. fa.*, and of this order on the said John Carroll, unless cause shown in four days after service hereof.

H. T. 1851.
Eschequer.

CASTLE v. KEANE.

Jan. 31.

GRIFFIN applied on behalf of defendant to draw out of Court the sums of £4. 4s., and £3. 11s. 6d., lodged on the 14th of October and 9th of November last, before the declaration was filed, or that the plaintiff do draw the same and apply it to the rent of certain lands not mentioned in plaintiff's declaration, and that plaintiff be precluded from giving the lodgment in evidence at the trial. The facts, as appearing on the defendant's affidavit, were, that on the 8th of October 1850, defendant directed the said sums of £4. 4s. and £3. 11s. 6d. to be paid to plaintiff's attorney for the rent of lands called Pumpfield, and at the same time called on Sweeny, who was acting for the plaintiff's attorney, for a particular of his demand, telling him that he owed half a year's rent for the said lands, and was ready to pay it, and costs. Sweeny said he would communicate with the plaintiff's attorney. On the 10th of October Sweeny wrote to the defendant's attorney stating that the writ showed sufficiently what the action was brought for; thereupon the defendant appeared and lodged said sum for Pumpfield. That declaration was then filed for the lands of Cahercalla, which defendant held as assignee, and had assigned before the rent had accrued due. That the defendant had a just and legal defence for the lands of Cahercalla. The defendant had furnished a consent to plaintiff "to draw the money, and that the lodgment should not be used on the trial." Counsel cited *Brady v. Rotheram* (a) in support of his application.

An action brought for rent against the defendant, holding two denominations of lands, P. and C., the defendant lodged in Court the rent due for P. (having a defence for the rent of C.) before the declaration filed. The plaintiff declared for the rent due for C. alone. On application of defendant the money lodged ordered to be paid to plaintiff for the rent of P., and the lodgment not to be given in evidence at the trial.

LEFROY, B.

Let the plaintiff or his attorney have the money lodged for the lands of Pumpfield, undertaking not to rely on the lodgment at the trial, and the costs to be costs in the cause.

(a) 1 I. J. 246.

H. T. 1851.

Eschequer.

M'CLINTOCK v. CUNNINGHAM and others.

Feb. 4.

In ejectment, the affidavit of plaintiff under the 252nd General Rule, verifying service of summons, dispensed with by virtue of the 4th Rule of the 15th of January 1851, when plaintiff out of the jurisdiction: the verification of same by his law agent in this country and attorney in the action deemed sufficient.

LEFROY moved, under the order of the 15th of January 1851, that the verification of the service of the summons in ejectment required by the 252nd New General Order be dispensed with.

The plaintiff resided out of the jurisdiction. Mr. Ellis, his attorney in this country, and who was employed by the plaintiff to bring the present action of ejectment, had verified the service, and one of the defendants had appeared.

LEFROY, B.

Let the plaintiff be at liberty to proceed on the writ of summons in ejectment in this cause, without filing his affidavit in verification, as required by the 252nd New General Rule.

LEWIS v. WALTERS.*

Feb. 5.

Application to change venue on special grounds cannot, under the 92nd New General Rule, be made until issue joined on all the pleas.

R. NORMAN applied for an order to change the venue on special grounds, in an action for goods sold and delivered, and on two bills of exchange.

Meagher objected that the application was premature, as by the 92nd General Rule "no application to change the venue on special grounds shall be made until after issue joined." The declaration contained counts for goods sold and delivered; and on the two bills

* RICHARDS, B., *absente*.

of exchange, to which the defendant had pleaded the general issue and set-off.

H. T. 1851.

Exchequer.

LEWIS

v.

WALTERS.

Norman contended that issue was joined.

Meagher.

There is this test:—notice of trial could not be served; the plaintiff might demur to the plea of set-off, or enter a *nolle pros.* to so much of the action as it applied to. The object of requiring issue to be joined is, that the Court may judge of the convenience of changing the venue; in fact the case should be in a position to have the case for proofs stated.

PENNEFATHER, B.

The law is as stated by Mr. *Meagher*.

Per Curiam.

We think issue must be joined on all the pleas. No costs.

BERKELEY v. NEWENHAM.

Feb. 15.

BERKELEY moved, pursuant to the 169th General Order, for liberty to issue a *scire facias* to revive a judgment more than twenty years old. The affidavit stated that interest had been paid thereon up to last gale day.

Order for *scire facias* to revive a judgment absolute, in first instance, under the 169th New General Rule, where interest paid to last gale day.

On that ground Counsel applied that under the words contained in the said General Order, viz., "the order shall be conditional only "in the first instance, unless for *special reasons* the Court shall "otherwise direct," the order should be in this case absolute in the first instance.

H. T. 1851. PENNEFATHER, B.

Eschequer.

BERKELEY
v.

NEWENHAM.

The interest having been paid to the last gale day, is a good ground within the meaning of the words in the Rule, "special reasons," for making the order absolute in the first instance.

RHODES v. BAKER.

T. T. 1851.

A party will not be permitted, on the trial of a suggestion of breaches, to impeach the instrument itself on the ground of usury; though the Court will, on a substantive motion, set aside a warrant of attorney, and judgment entered by virtue of it, if the contract, being for an interest in land, appear to be usurious; and in such case it will not impose terms on the defendant.

A sale of growing trees, or underwood, is a sale of an interest in land.

THIS was an inquiry on a suggestion of breaches, in which the jury had found a verdict for the plaintiff for £140. A conditional order had been obtained to set this verdict aside; and the question which now came before the Court above was, whether the defence of usury was open to the defendant at that stage of the proceedings? There was also a substantive motion by the defendant that the judgment on which these proceedings were taken should be set aside, and the warrant of attorney, pursuant to which the said judgment was entered, should be cancelled, and the plaintiff be ordered to declare on the bond.

It appeared that a Mr. J. W. Wall, being the tenant for life, without impeachment of waste, of large estates, and being in embarrassed incumbrances, had in May 1848 executed a mortgage of certain "woods, timber and underwoods," and had granted "a right of entry to cut and fell same, and to dig sawpits" for their manufacture, to one James Sadlier, the public officer of the Tipperary Joint Stock Company. Wall at the same time assigned to Sadlier a policy of insurance on his life as a collateral security.

Early in the year 1849, Sadlier required payment of the sum due on foot of this mortgage, which amounted to £4235 (the original amount being £4500), and Wall being unable to pay, applied to the plaintiff to advance the money on an assignment of Sadlier's mortgage and policy of insurance. To this the plaintiff agreed, on condition of his receiving a bonus of £500, and of Wall's procuring the

bonds (with warrant of attorney) of two solvent persons, conditioned for the punctual payment of the interest on the loan, and the premiums of the policy. The defendant and a Mr. R. Manders entered into these securities on the 24th of April 1849, and judgments were duly entered on their bonds; and on the 12th of November 1850, the interest being unpaid, a suggestion of breaches was filed by the plaintiff against the defendant, and a writ of inquiry sped. On the inquiry the plaintiff, after proving the bond, proved the suggestion of breaches by giving in evidence the bond, the mortgage deed and assignment. The defendant gave in evidence the agreement of April 1849, on which the mortgage was assigned to the plaintiff, and a memorandum of the same date recited therein, which showed the application of the loan, the bonus of £500 to the plaintiff appearing therein, and submitted that upon the whole of these documents, the contract appearing to be usurious, and for an interest in land, the plaintiff could not recover. The CHIEF BARON thought that such defence was not open on a writ of inquiry, and directed a verdict for the plaintiff, but gave leave to the defendant to move that the verdict should be entered for him if the Court should be of opinion that such defence was admissible.

T. T. 1851.
Exchequer.
 RHODES
 v.
 BAKER.

George (with whom was *Lynch*) now moved that the conditional order should be made absolute, and at the same time moved to set aside the warrant of attorney and judgment. Admitting that where a person has pretermitted his opportunity to plead to an action on a bond, he cannot after judgment go into the original consideration; yet this is a distinct statutory proceeding under 9 W. 3, c. 10, s. 8, and the Court is not governed by the ordinary rules of evidence. The plaintiff was here obliged to assign all the breaches: *Gainsford v. Griffith* (a); *Plomer v. Ross* (b); and to set out only all the instruments on which he relied to prove them. It appearing therefore on the face of these instruments that the contract was usurious, the Judge should have directed a verdict for the defendant.—[Pigot, C. B. Is the defendant in a better position in an assignment of breaches after judgment by default, than he would be

(a) 1 Sand. 57, n. 1.
 VOL. I.

(b) 5 Taunt. 386.
 62 L.

T. T. 1851. in a replication in the case of a declaration on the bond, without a
Exchequer.
 RHODES special plea?—LEFROY, B. How do you get the plea of usury
 v. on the record?—PENNEFATHER, B. The speeding of an ordinary
 BAKER. writ of inquiry on an absolute judgment appears to me to be parallel with this case.]—The distinction between the two cases is that on which we rely; the plaintiff's evidence being necessarily produced to prove his case on the suggestion of breaches, it is liable to every infirmity that appears on it: *Kearney v. Power* (a).—[LEFROY, B. That was the case of an instrument rejected in evidence being improperly stamped.]—If the Court did not take notice of the proofs here, it would be ratifying instruments made void by statute.—[PENNEFATHER, B. You must plead "usury;" that defence must appear on the record.—LEFROY, B. You cannot give in evidence "usury" on the plea of *non est factum*; but on that plea the instrument to support it must be stamped if produced. The object of the Act was to assess damages, not to try the validity of instruments, to enable that to be done at law which otherwise you could do only in equity by an issue *quantum damnificatus*; and in that issue you could only go into the amount of damages, not into the validity of the instrument.—[PENNEFATHER, B. Any other finding would be against the judgment.]—The mortgage is now for the first time brought on the record; when so brought it is condemned on the face of it. As to the alternative motion, the contract is clearly on the security of an interest in land, viz., growing timber, and usurious; we are therefore entitled to carry that.

J. D. Fitzgerald and J. B. Murphy, for the plaintiff.

The first application is clearly untenable. As to the second, our proposition is, that the security in question is not a conveyance of lands, or of any interest therein. The statute contemplates a *direct* security on land: *Baker v. Allen* (b); *Lane v. Horlock* (c). The right to enter and make sawpits is a mere license: *Wood v. Ledbetter* (d), in which a license for a particular purpose is distinguished

(a) 7 Ir. Law Rep. 465.

(b) 10 Ir. Eq. Rep. 229.

(c) 4 D. & L. 408.

(d) 13 M. & W. 845.

from an interest: *Taylor v. Waters* (a); *Wood v. Manly* (b). Then the sale of timber growing on land is not within the Statute of Frauds, and may be by parol: *Littlewood v. Smith* (c), cited by Holroyd, J., in *Mayfield v. Wadsley* (d); *Smith v. Surman* (e).—[LEFROY, B. That must have gone on the ground that the bargain being by parol, as soon as the trees *were cut* it was binding, and the vendee might enter to take them away. The case in *Lord Raymond* is of little authority.—PENNEFATHER, B. Growing trees are as much an interest in land as growing grass.]—The words in the statute relate to contracts for the sale of the fee-simple, or a less interest in land, which give the party a right of occupation.—[PIGOT, C. B. *Scorell v. Boxall* (f) is a direct authority that the sale of growing underwood, to be cut by the purchaser, is a sale of an interest in land.]—The sale of a crop of growing potatoes is not a sale of an interest in land: *Evans v. Roberts* (g). At all events, if the Court should set aside these proceedings, it would do so on the terms imposed by Courts of Equity: *Hindle v. O'Brien* (h); *Fitzroy v. Gwillim* (i).

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 v.
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Lynch, in reply.

Growing trees are part of the realty. Sir Edward Sugden distinguishes *Smith v. Surman* on the ground that the trees were sold by the foot, and in process of being cut down. Growing fruit is an interest in land: *Rodwell v. Philips* (k). As to the question of terms, the imposition of terms would give a protection and encouragement to usurious contracts. *Hindle v. O'Brien* is overruled by *Roberts v. Gough* (l); *Berrington v. Colles* (m); *Edmunson v. Popkin* (n). We do not ask to set aside the securities, but the warrant of attorney and judgment.

(a) 7 Taunt. 374.

(c) 1 Ld. Raym. 182.

(e) 9 B. & C. 561.

(g) 5 B. & C. 829.

(i) 1 T. R. 153.

(l) B. & Al. 92.

(b) 11 Ad. & El. 34.

(d) 3 B. & C. 364.

(f) 1 Y. & J. 396.

(h) 1 Taunt. 413.

(k) 9 M. & W. 501.

(m) 5 Bing. N. S. 332.

(n) Bos. & P. 270.

T. T. 1851. **PIGOT, C. B.**Eschequer.

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v.

BAKER.

As to the first part of this application to set aside the verdict of the jury on the suggestion of breaches, that cannot be granted. It is founded on the argument, that because it appeared on the face of an instrument one of the necessary *media* of proof that the contract was usurious, the Court should set aside the verdict of the jury. But no authority has been cited for the proposition that the Court should suffer a party on a suggestion of breaches to impeach the instrument itself on the ground of usury. It is clear that in an action on a bond the defence of usury should appear by plea, and where the statute gives a proceeding by which such defence cannot be made to appear on the record, the Court cannot in such proceeding admit such defence to contradict the judgment. That which the jury had to try was not the presence or absence of usury, but the amount of damages. It would be a surprise on the plaintiff to call on him in this proceeding to vindicate an instrument which was not impeached on the record. The Act substitutes a suggestion of breaches for the proceeding in equity. It places both parties in the same position as if an issue "*quantum damnificatus*" were directed, on which issue the deed could not be impeached, but only the amount of damages inquired into.

The second question is, whether we are to set aside the judgment and warrant of attorney? This depends on the question whether an assignment of trees and underwood is an assignment of an interest in land? In the case of underwood the question has been decided in *Scorell v. Boxall* (a). If it were an assignment of trees to be cut by the purchaser, that would be an assignment of an interest in land. None of the cases of "*fructus industrialis*" apply. Trees constitute a portion of the soil itself as much as grass. It is clear therefore that this was a contract for an interest in land, and therefore within the excepting clause of the statute.

The only question remaining is as to the imposition of terms on the setting aside these instruments, and the principle has been rightly stated by Mr. *Lynch*, viz., that the Court will not suffer itself to be made the instrument of effectuating that which the law forbids.

(a) 1 Y. & Jer. 396.

The law makes a warrant of attorney void if the transaction be usurious. The act of the Court entering judgment on the warrant is the act of the party. It is done as a matter of course without inquiry. If the Court is not to set aside a judgment thus obtained without requiring payment of the sum actually advanced, it would be a frustration of the Usury Act. The old cases show the Courts were not in the habit of imposing terms. *Hindle v. O'Brien* was a peculiar case. The contract there was acted on, and the decision was not put as a general rule that the party must act as in a Court of Equity, but that the party had disentitled himself to the interference of the Court; and that case is overruled by *Roberts v. Gough*.

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PENNEFATHER, B., concurred.

LEFROY, B.

On the question of permitting a party to impeach the instrument, under the statute allowing him to assign breaches thereon, that would be permitting him to apply the statute to a purpose for which it was not intended. The Legislature intended to substitute a remedy instead of the recourse to a Court of Equity. But when a Court of Equity directed an issue *quantum damnificatus*, you never could impeach the judgment. It would be trying the title to land in this case on a suggestion of breaches, to try the question of usury there. As to the question whether growing timber is an interest in land, Wall was enabled to convey the trees not as grantee of the trees, but as tenant for life of the lands without impeachment of waste. But so little had he the property in the trees, as trees, that he could not grub them up; it was by virtue of his estate in the land that he had the title to the trees when cut. With respect to the terms of relief, the usage has been here to give relief without imposing terms. There is something plausible in the argument that this is an application to the equitable jurisdiction of the Court, and that the parties should therefore do equity; but the argument is more plausible than solid. This is not an application to any thing properly called the equitable jurisdiction of the

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RHODES
v.
BAKER. Court, it is to its legal jurisdiction. This Court only opens the question by setting aside the judgment and ordering the party to declare on the bond. But a Court of Equity, having no jurisdiction to set aside the judgment, will not meddle with it to give the party relief without his paying the sum actually due. A Court of Equity does not open the question ; it considers it closed, and in restraining a party from exercising a legal right at the instance of another, makes him pay that which is due ; and this distinction between the jurisdiction of the Courts may well account for the difference in practice.

Set aside the warrant of attorney and judgment without costs, plaintiff declining to declare on the bond. Defendant to pay the costs of the trial of the suggestion as well as the costs of the first motion.

T. T. 1851.
Queen's Bench

COMYNS and another v. DALGLEISH.

(*Queen's Bench*).

May 27.

COATES, on behalf of the plaintiffs, applied for liberty to file a declaration varying from the form settled by the Judges pursuant to the 13 Vic. c. 18.

The action was brought by the drawers to recover the amount of a bill of exchange, drawn by a firm and accepted by another firm, the surviving partner of which latter firm was a lady who had married since the bill was accepted. The prescribed form of declaration against acceptors will not suit the present case, as special averments must be inserted in the declaration.

In an action by drawers against acceptors of a bill of exchange, the acceptors being a partnership, the surviving member of which was a lady who had since the bill was accepted married; *Held*, that the common form of declaration was not sufficient, and leave to vary therefrom was granted.

PERRIN, J.

The Process and Practice Act, passed by the Legislature to simplify the proceedings in an action and to diminish the expense, appears to have had quite a contrary effect. I have consulted with my Brother CRAMPTON as to this application, and we are of opinion the order should be made.

NOTE.—Numerous applications to vary from the prescribed form of declaration have been made since the passing of the Process and Practice Act; but as they have in general been made before a single Judge, and without argument, there has been an apparent contrariety of decision between some of the rules made on such motions. It was evident to every Lawyer, when the 18th section of that statute, 13 Vic. c. 18, was passed (directing that the Judges should "settle upon and approve of a plain and simple form of declaration to be hereafter used in all actions at Law to be brought or maintained upon any bill of exchange," &c., "which form, and no other," was to be used, unless the Court would order to the contrary), that it was impossible any man or set of men could settle a form of declaration including every case, without the entire abolition of the rules of pleading, and that practically the provision could not be effectuated; so true is the old rule—"Neminem oportet esse sapientiores legibus."

T. T. 1851.
Queen's Bench

Lessee SYNAN v. MORIARTY.

May 27.

A copy of an affidavit omitting the jurat is not a true copy, and a motion resting on the service of such document is untenable.

BREKERTON (with him *Lane*), moved on behalf of the defendant for an attachment against the lessor of the plaintiff for non-payment of costs. The plaintiff had been nonsuited.

Sullivan, contra, objected that no copy of the jurat of the affidavit had been served pursuant to the 13 *Vic. c.* 18, s. 44 (Process and Practice Act), and therefore what was served could not be called a true copy of the affidavit, and consequently the motion could not be entertained.

Per Curiam.

This is not a copy of the affidavit; the document served does not purport to be sworn at all; and the Act of Parliament requires a true copy of every affidavit filed to be served on the opposite party. We must say—

No rule.

HUGH O'RORKE and THOMAS PURCELL

v.

MICHAEL KINSELLA.

May 28.

An irregularity in a bailable process, such as the omission to indorse the amount of bail, or to state by whom it was directed, or not giving the residence of the defendant, will not justify a Sheriff in not executing it, and is no cause against an attachment issuing against him.

D. LYNCH moved on behalf of C. A. Walker, Sheriff of the county of Wexford, to show cause against an attachment issuing against the said Sheriff, or that an order for the attachment, dated the 20th

amount of bail, or to state by whom it was directed, or not giving the residence of the defendant, will not justify a Sheriff in not executing it, and is no cause against an attachment issuing against him.

of May be set aside, and that he should not be compelled to return the writ in this cause, inasmuch as the said writ of *capias ad respondendum* was irregular and void, same not being indorsed with the amount of bail, or stating by whom it was directed, and same not containing the place of residence of the defendant.

T. T. 1851.
Queen's Bench
 O'BORKE
 v.
 KINSELLA.

The writ was to answer the plaintiffs of a plea of trespass, and at foot of it was this memorandum :—

"Debt £38. 9s. 1d. By Judge's fiat.—A. BUSHE." And the indorsements on the writ were :—

"Bail for — pounds. By order of —.

"Dated this — day of —."

This writ was delivered at the office of the Sheriff on the 3rd of May, returnable on the 17th of May; and the Sheriff not having returned it, an order was obtained on the 20th of May that he do so in two days after service of the order, or that an attachment issue. The writ is substantially defective, and therefore absolutely void; and if an arrest had been made under it, the arrest would be set aside, and the party discharged. There is no indorsement of bail for any sum on the writ; the name of the Judge who granted the fiat is not stated, nor is there any indorsement as to the defendant's addition, occupation or residence, or where he was to be found. The indorsement is in blank, and the statute 3 & 4 Vic. c. 105, s. 2, requires that the writ should have marked at the foot thereof, or indorsed thereon, the sum for which the defendant was ordered to be arrested, or held to bail, and should have subscribed at the foot thereof the memorandum and warning, and the several indorsements specified in the schedule to the statute should also be indorsed thereon.

Sidney, for the plaintiff.

The statute prescribes an alternative.—[CRAMPTON, J. You have only indorsed what you claim.]—We have put the indorsement on the face of the writ, not on the back, and have substantially complied with the requisites of the Act of Parliament. In England all marked writs are indorsed: *Bridgman v. Curgenvon* (a). In Ireland they are marked at foot.

(a) 3 Dowl. P. C. 1.

T. T. 1851. But the answer to this motion is, that it is made on behalf
Queen's Bench of the Sheriff to afford him an excuse for not executing the writ.
O'BORKE It is not made on behalf of the defendant, which probably might
v. vary the ruling of the Court. The Sheriff cannot question the
KINSELLA. legality or illegality of a writ if he can justify under it: *Watson*
on Sheriffs, p. 67. In a writ of bailable process the addition and
residence of the defendant are not necessary to be indorsed thereon.
But if they were, we have furnished the Sheriff with both ; and he
actually arrested the defendant, and has since suffered him to escape ;
so we allege in our affidavit.

Lynch replied.

CRAMPTON, J.

No cause has been shown by the Sheriff why this attachment should not issue against him. He is the officer of the Court, and is bound to execute its writs. The argument of Mr. *Lynch* is based on the allegation that the writ is utterly void ; it is no such thing. The 3 & 4 *Vic.* c. 105, s. 2, referred to, was passed for the ease and benefit of defendants, and it prescribes certain indorsements to be made, if an arrest is to be effected. True, in the present case there was the absence of an indorsement, but that is but an irregularity, which the defendant may waive. But what has the Sheriff to do with that ? If the defendant choose to pretermitt the irregularity, the Sheriff has nothing to do with it ; he cannot identify himself with the defendant ; he, on receiving the writ, is bound to execute it, and it appears he did so ; for it is sworn he had the defendant in custody and has allowed him to escape. He therefore is not now to be heard special pleading to the form of the writ, which he has actually executed, and endeavouring to persuade the Court that the writ was null and void. There being no cause shown against the rule, it must be made absolute.

PERRIN, J.

It is too much to call on the Court to say this writ is void. The

Sheriff should not have taken upon himself to decide what was matter for the Court. He should have returned the writ.

Rule for attachment absolute; not to issue until after the expiration of ten days.*

* The CHIEF JUSTICE and Mr. JUSTICE MOORE were absent, from indisposition.

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ARTHUR WELLESLEY WILLIAMS.

May 31.
June 2, 12, 14.

H. SMYTHE (with him *Daniel M'Dermot*) moved that the defendant be discharged from custody, on the ground that he had been illegally arrested.

It appeared from the affidavits that an action had been commenced against the defendant in February last on foot of a judgment obtained against him in England for a sum of £5000. The defendant entered an appearance to this action on the 5th of March following; and a declaration was filed against him in May; and on the 27th of May the plaintiff gave security for costs, he being resident out of the jurisdiction. The defendant was an officer serving in the 12th Light Dragoons, then quartered in Dublin, but under orders for the Cape of Good Hope; and the regiment being expected to sail in a few days for that colony, a Judge's fiat was obtained

A declaration having been filed against the defendant, who was ordered abroad with his regiment, a Judge's fiat was obtained for his arrest; in the *capias ad respondendum*, that issued on foot of the fiat, and in the warrant of the Sheriff thereon, the defendant was called *Charles W. W.*, his real name being Arthur W.W.—*Held*, that such arrest was illegal.

Held also, that the Court had power to amend the writ by inserting the proper name of the defendant.—[PERRIN, J., *dissentiente*.]

In an affidavit made to ground a fiat, the name of the attorney of the plaintiff was omitted to be annexed to the affidavit pursuant to the 207th General Rule.

Held, that this was but an irregularity, to be dealt with by the Judge who granted the fiat, and that it did not vitiate the subsequent proceedings thereon.

A subsequent detainer lodged against a defendant illegally arrested, without collusion with the other creditors, is good, and the Sheriff is bound to detain the prisoner in custody.

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by the plaintiff for the arrest of the defendant under 3 & 4 Vic. c. 105; and under that fiat the defendant was accordingly arrested on the 29th of May. The affidavits were rightly entitled, and the fiat was correct. So far the proceedings were regular; but it appeared that the *capias ad respondendum*, issued on foot of this fiat, and the warrant of the Sheriff thereon, was wrong in substituting the name of Charles Wellesley Williams for Arthur Wellesley Williams, the defendant's real name: *Watson on Sheriffs*, p. 70, 2nd ed.; *Morgans v. Bridges* (a).—[CRAMPTON, J. The writ is irregular, and the party must be discharged unless the writ can be amended.]

A cross notice had been served by the plaintiff for liberty to amend the writ by inserting the proper name, and—

Macdonogh (with him *Hayes*), on behalf of the plaintiff, submitted he was entitled to have the writ amended, as otherwise he would be materially damnified: *Plock v. Pacheco* (b). In that case an order had been made for the arrest of the defendant for a sum of £422, and the *capias* was indorsed for the sum of £422. 13s. 4d. (the real amount of the debt), and the Court refused to discharge the defendant out of custody, and directed the writ to be amended.—[CRAMPTON, J. In that case there was authority for the arrest; here there is none. *Perrin, J.* If we amend this writ we justify an illegal arrest.]—*Culverwell v. Nugee* (c). The Court never lend assistance to such an application as that made by the defendant, it being manifestly against justice: *Finch v. Cocken* (d); *Bilton v. Clapperton* (e).—[CRAMPTON, J. The defendant was there arrested by his proper name.]—But there was an ambiguity in it; he was not designated junior, and his father lived in the same house: *Laroche v. Wasbrough* (f); *Owens v. Dubois* (g); *Browne v. Hammond* (h). In that case, after a writ of *capias ad satisfaciendum* had been executed, the Court allowed the

(a) 1 B. & Ald. 647.

(c) 4 D. & L. 30.

(e) 9 M. & W. 473.

(g) 7 T. R. 696.

(b) 9 M. & W. 477.

(d) 2 Cr. M. & Ros. 196.

(f) 2 T. R. 737.

(h) Barnes' Notes of Cases, 10.

writ to be amended by the record of the judgment making the defendant's name Edmund instead of Edward. *Stevenson v. Danvers* (a). In that case A B was arrested under a capias, sued out against him by the name of B C. A bail bond was given by which A B, arrested by the name of B C, became bound, conditioned for the appearance of A B arrested by the name of B C; the affidavit to hold to bail named the defendant properly A B. The Court amended the capias and return, and rejected an application by the bail to set aside the bail bond: *Thorpe v. Hooke* (b); *Moore v. Magan* (c). If the defendant's identity be indisputable, no mischief can result from his arrest; and the 3 & 4 Vic. c. 105, s. 40, abolishes the varied proceedings that resulted from abatements and irregularities in writs: *Callum v. Leeson* (d). The affidavits are rightly entitled, and the mistake occurs in the capias, not the writ in the cause, but an off-branching writ.—[PERRIN, J. A writ cannot be altered after it has issued, because it must be re-sealed before the return. After an illegal arrest, will the Court alter the writ without re-sealing it?—The Court has inherent power to amend its writs: *Clanmorris v. Lambert* (e).

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Smythe, contra.



In those cases cited there was something to amend by; here there is nothing to amend by. In *Scandover v. Warne* (f), which was an action on a bail bond against one of the bail, the declaration averred that by a writ of latitat the Sheriff was commanded to take one Francis J., by the name of John J., and the Court held this averment was not supported by evidence of a latitat in the common form, commanding the Sheriff to take John J., although the bail bond was signed by the principal "Francis J., arrested by the name of John J.," and the plaintiff offered to prove that this person was the debtor whom they meant to hold to bail: *Hoye v. Bushe* (g);

(a) 2 B. & Pul. 109.

(b) 1 D. P. C. 501.

(c) 16 M. & W. 94.

(d) 2 Cr. & Mees. 406.

(e) 1 Ir. Jur. 207; S. C. post, 519.

(f) 2 Camp. 270.

(g) 2 Sc. N. R. 86.

T. T. 1851. *Cole v. Hindson* (a); *Coles v. Gum* (b); *Symes v. Batt* (c); *Tilly Queen's Bench v. Newman* (d); *Phillips v. Corfield* (e).

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In *Finch v. Coken* the party was sued by the wrong name in the process. In *Bilton v. Clapperton* the question arose on the addition of the party, not on his name. The Court should not amend this writ, for it is void, and incapable of being amended.

Cur. ad. vult.

CRAMPTON, J.

June 2.

In this case a very important question arises. A Judge's fiat had been issued on the 28th of May for the arrest of the defendant, marked for the sum of £1658. An action had been commenced against the defendant in February last on foot of a judgment obtained against him in England. It appears from the affidavits that the defendant is an officer in a regiment at present quartered in Dublin, but under orders for the Cape of Good Hope, and expected to sail in a few days. Under these circumstances the plaintiff, exercising his undoubted privilege, makes an affidavit to ground a fiat, in which he states what I have already stated, adding that if the defendant was not arrested, he would be in danger of losing his demand. A fiat was accordingly granted, and under it the defendant was arrested, and there has been no attempt to quarrel with the order so made, that order being quite regular, and according to the course of the Court. But a mistake, it appears, was made in the capias issued on foot of this fiat, and the warrant of the Sheriff thereon, in substituting the name of Charles Wellesley Williams for the name of Arthur Wellesley Williams, the defendant's real name, and the name correctly stated in the order. Under this capias, the defendant was arrested.

Although this was a mere slip, it cannot be denied that the arrest was irregular, inasmuch as the *capias* was not warranted by that order on which it was grounded, and therefore, properly

(a) 6 T. R. 234.

(b) 6 Moer. 523.

(c) 2 Ir. Law Rep. 23.

(d) 12 Ir. Law Rep. 71.

(e) 1 H. & Br. 509.

speaking, the defendant is not in legal custody, and his application now is for his discharge; and that discharge would follow of course, were it not the plaintiff moves, on the other hand, to amend the writ by making it conformable to the order, and it was agreed that the two motions should be heard together.

As to the identity of the defendant there is no doubt; and the question is, whether he is to be now discharged and so withdrawn from the jurisdiction, or whether we should not amend that which is a mere slip—a misprision of the clerk in filling up the writ? If we refuse this amendment, we do so against the merits—I mean the merits of the motion. For I wish always to distinguish between the merits of the cause itself, and the merits of the particular motion; a man may have a very good cause and make a very bad motion, and *vice versa*. I say this because the defendant has in his affidavit impeached the plaintiff's right of action; but with that we have nothing to do. We cannot try the cause upon affidavits. The question before us is simply whether we should make the amendment sought, or discharge the defendant in consequence of the mistake in the writ? The defendant insists that he is entitled to his discharge as a matter of right; that the Court has no jurisdiction to detain him, and that we have no discretion on the subject. I cannot subscribe to this doctrine. I think the Court has jurisdiction, and that we have a discretion to exercise, and that that discretion will be well exercised by amending the matter of form, and thereby doing substantial justice.

In the case of *Thorpe v. Hook*, upon a motion similar to the present, the amendment sought was made; and Mr. Justice Littledale there says:—"It seems, from considering all the cases on the subject, that the amendment in such cases as the present is a matter for the discretion of the Court." In Ireland also the practice has been to consider such amendments as a matter of discretion. *Symes v. Batt* shows this plainly. The application there was grounded on the 23rd General Rule of Easter Term 1834, which is, "When the defendant is described in the process or affidavit to hold to bail by initials or wrong name (that is the case here), or without a Christian-name, the defendant shall not therefore be discharged out of

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T. T. 1851. "custody, &c., if it shall appear to the Court, or a Judge in Chamber,
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 PAGE "that due diligence has been used to obtain knowledge of the proper
 v. "name." Under that rule it became a matter for the discretion of
 WILLIAMS. the Court whether or not a party arrested under a wrong name
 should be discharged; and the ground of Baron Pennefather's order
 in that case, that the party should be discharged, seems to have been
 that there had not been due diligence used in ascertaining the real
 name of the defendant. Here there was a mere misprision of the
 clerk in filling up the name. Then we have the case of *Owens v.*
Dubois, in which an order to amend, on an application similar to the
 present, was made. That was a case where the plaintiff declared
 against the defendant by the name of John Herbert Valentia Dubois;
 the defendant pleaded in abatement that his name was John Hubert
 V. D.; and the plaintiff then declared against him as John Hubert
alias Herbert, to which the defendant again pleaded in abatement
 that his name was John Hubert, and not John Hubert *alias* Her-
 bert. The defendant had been arrested, and it was argued that if
 the declaration was abandoned, and the plaintiff obliged to file a new
 declaration, the defendant would be entitled to be discharged, on the
 ground that the plaintiff had not declared within two Terms; it was
 therefore moved to amend the declaration by striking out the words
 "*alias* Herbert," and the Court granted the application, stating that
 when the amendment was made it would be considered as a declara-
 tion from the time when it was first filed. Another case very much
 in point is *Bicknell v. Wetherell* (a), it is almost *quatuor pedibus* with
 the present, save that the arrest in that case was under a *capias ad*
satisfaciendum, and not, as here, under a *capias ad respondendum*.
 Lord Denman there says:—"A strong authority has been pointed
 "out by my Brother Coleridge in the instance of *Thorpe v. Hook* (b),
 "where an amendment after a return of the *ca. sa.* was allowed
 "by Littledale, J., who, of all Judges, was least unlikely to give
 "effect to an objection in favour of liberty. In this case we cannot
 "see any possibility that the proceedings would not all have been
 "right, but for the slip in question." Patteson, J., concurs, and
 says, "It is inconsistent with the practice and nature of amendments

(a) 1 Q. B. 914.

(b) 1 Dow. P. C. 501.

"to say that the plaintiff here should be put to a *scire facias* which introduces an entirely new writ." Two considerations always arise in those cases; first, is there any thing to amend by? here are all the proceedings to amend by; all regular down to the writ of *ca. sa.*; secondly, will any damage ensue to the defendant? It is plain there can be none at all, unless it be a damage to compel him to give bail according to the course of the Court; whereas, if we refuse the motion, and discharge the defendant, the plaintiff runs the risk of losing his debt altogether.

I think therefore that the amendment should be made, and that the defendant should not be discharged without giving bail.

PERRIN, J.

In this case I have come to a different conclusion from that of my Brother CRAMPTON. The defendant named in the Judge's fiat as Arthur Wellesley Williams applies to be discharged from custody upon the ground that he has been arrested upon a *capias* issued against a person named Charles Wellesley Williams, alleging that he was never known or called by that name. That *capias* was issued under a Judge's order, against which there is no complaint. The action against the defendant had been commenced so long ago as February by his right name; from that time until the month of May no steps were taken, when an order was obtained to stay proceedings until the plaintiff should give security for costs; a compromise was then attempted, which not being successful, liberty to proceed, compromise being off, was granted, and then proceedings were taken, out of which the present application springs. No objection is made to the Judge's fiat. It is true that under that order for liberty to issue a *capias* against Arthur W. Williams a *capias* and warrant was issued against Charles W. Williams by the mistake of some person. That *capias* was unwarranted by the order, and the arrest of Arthur W. Williams under it by the Sheriff was clearly illegal, and so have been his subsequent detention and custody.

It has been said this is a matter of form, and that we ought to accede to the application of plaintiff's Counsel, and allow the writ to

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be amended: and the case of *Finch v. Cochen* has been relied on. The observations of the Judges in that case are very important, and especially those of Lord Abinger. He says:—"The present case has been argued on the ground that the late statute has introduced a very important alteration in the law of arrest; and according to the law as it existed before that statute, it is clear that no warrant for the arrest of any person was legal that did not contain his name, or at least some *designatio personæ*, by which he might be ascertained. If we are now to hold otherwise, we should introduce once more all the notions that once prevailed on the subject of general warrants. If because the modern Acts have disposed of the plea in abatement, both in civil and criminal process, we were to infer that a Sheriff or public officer may arrest with impunity a person whose name is not in the warrant, we should make a most violent alteration in the law of arrest. It is true that such illegality may be waived, as when the defendant suffers the proceedings to go to execution, in which case he is precluded by the judgment from taking the objection." And Parke, B., agrees with him and says:—"When the writ is in a wrong name, the statute does not compel obedience to it." Now, are we to be told that if the defendant had used force in resisting his arrest, he might have been justified, but when he submits, he is not entitled to his discharge? That is a dangerous doctrine. It never was contended in any case that the party, by altering the writ of execution, might justify an illegal imprisonment. It appears to me that the arrest here was illegal, and that if the defendant obtained a *habeas corpus*, he would be discharged. I am at a loss to understand why he should not have a right of action against the plaintiff, against the Sheriff, and against every person instrumental in detaining him in custody; and yet we are called on to deprive him of that right of action, and to alter and amend the writ so as to make it one against the defendant himself, and by our order render an illegal arrest legal, and a false imprisonment justifiable.

There certainly are instances in which the Courts have amended writs. In the case of *Thorpe v. Hook*, in which two writs of *scire facias* had issued, and had been returned *nihil*, and then a *ca. sa.*

was issued in a different Christian-name from the one stated in the judgment, the Court, after the *ca. sa.* had been executed and returned, allowed the proceedings to be amended. But in that case there was no false imprisonment, because the *capias* was warranted by and followed the judgment, and the party was in legal custody. There was nothing but a question of variance. But I very much doubt the right of the Court to alter a writ after a party has been arrested and has suffered a false imprisonment, and thereby to make that imprisonment legal which was previously clearly illegal; and it is no sufficient answer to say that this was a case of a debtor and creditor, and that the law ought to be exercised so as to protect the creditor and make the debtor liable. With regard to that argument, something would depend on the nature of the debt, as to its being or not a just one. Here the debt is sworn to have been incurred in a gambling transaction, and that is not denied by the plaintiff; he does not show or suggest it to have been a just debt. The judgment was obtained on a warrant of attorney, and the defendant certainly does not come within the description of an absconding debtor; he was under orders to go abroad with his regiment; and the plaintiff, to enforce his demand, issues this *capias*, to which, if the defendant do not give bail, he must suffer a very serious loss. In such a case this Court ought to be cautious, for it is questionable whether an officer going abroad with his regiment comes within the description in the Act of Parliament of a person leaving the country.

It is again said that if we refuse the order sought to amend, we go against a course of proceeding adopted by the Courts in order to avoid the bar created by the Statute of Limitations; but by refusing the present application we do not affect the plaintiff's right to recover the debt. In the cases decided in reference to the Statute of Limitations, the debt would have been barred if the amendment had been refused; but here the defendant may be arrested under a legal process; and the only danger that can result to the plaintiff is, that the defendant may be at large for the present. It is to be observed that the subject-matter of this judgment is examinable here; it is not conclusive like a judgment obtained in this country.

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T. T. 1851. On the whole, I doubt the authority of this Court to make the
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 PAGE would clearly prejudice the rights of one party, and take from him
 v. would clearly prejudice the rights of one party, and take from him
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 I therefore cannot assent to the application for the amendment.

No rule.

Several detainers were then lodged with the Sheriff against the defendant, and a new notice of motion having been served for the full Court—

Macdonogh (with him *Hayes*) moved on behalf of the plaintiff that the *capias ad respondendum*, which issued out of this Court on the 28th day of May, under a fiat granted by Mr. Justice Crampton, and directed to the Sheriff of the county of Dublin, be amended by changing the name of Charles Wellesley Williams to Arthur Wellesley Williams.

The affidavits are all rightly entitled, and therefore there are materials to amend by; and where the identity of the defendant is not questioned, the Court will grant an application like the present. It is sworn the mistake in the name was a mere clerical error. It is settled law that if a defendant do not apply to be discharged from an illegal arrest within the time he might have pleaded in abatement, he will be detained in custody: *Binfield v. Maxwell* (a). A series of cases from 1732 to the present time establishes that the Court will grant an application like the present: *Browne v. Hammond* (b); *Carr v. Shaw* (c); *Ruthford v. Mein* (d); *Hunt v. Kendrick* (e); *Mackie v. Smith* (f); *Bicknell v. Wetherall* (g); *Philips v. Corfield* (h); *Brown v. Fullerton* (i).

Fitzgibbon and *H. Smythe*, contra.

Actions for false imprisonment against several parties concerned

(a) 15 East, 159.

(b) Barnes Notes of Cases, 10.

(c) 7 T. R. 299.

(d) 2 Sm. R. 392.

(e) 2 Wm. Black. 836.

(f) 4 Taunt. 322.

(g) 1 Q. B. 914.

(h) 1 Hud. & Br. 519.

(i) 2 Dowl. & Low. 251.

in this arrest have been begun, and before this notice of motion was given the writs were served. In *Tidd's Practice*, p. 161, 9th ed., it is said:—"But the Court of King's Bench would not grant a "rule for amending the writ under which the defendant had been "arrested by a wrong name, after actions of false imprisonment had "been brought for such arrest:" *Israel v. Middleton (a)*; *Byfield v. Street (b)*; *Nicol v. Boyn (c)*; *Hodgkinson v. Hodgkinson (d)*; *Hoye v. Bush (e)*; *Taylor v. Ruthernan (f)*; *Coles v. Gunn (g)*.

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Hayes replied, and referred to *Laroche v. Wasborough (h)*; *McCormack v. Melton (i)*; *Macdonald v. Mortlock (k)*.

Cur. ad. vult.

H. Smythe (with him *Fitzgibbon*) then moved a cross motion on behalf of the defendant, that he be discharged from custody under the writ and warrant in this case, and the subsequent detainers. Since Page's arrest of the defendant two detainers have been lodged; and if the defendant be entitled to his discharge on the illegality of the first arrest, he cannot be kept in prison by the subsequent detainers. Where the original taking by a Sheriff or bailiff be illegal, so that the person arrested never was in legal custody, the subsequent detention must follow the fate of the first taking; but if the writ be set aside for reasons unconnected with the Sheriff, the subsequent detainers are not to be prejudiced: *Barratt v. Price (l)*; *Robinson v. Yewens (m)*; *Ex parte Ross (n)*; *Carson v. Sothwell (o)*; *Collins v. Ewens (p)*.

June 12.

R. Longfield, for one of the detaining creditors.

It does not matter whether or not the first writ be valid, the sub-

(a) 1 Chit. R. 319.

(b) 10 Bing. 27.

(c) 10 Bing. 339.

(d) 3 Nev. & Man. 564.

(e) 2 Scott, N. R. 86.

(f) 6 Moo. 264.

(g) 8 Moo. 526.

(h) 2 T. R. 737.

(i) 1 Ad. & El. 331.

(k) 2 D. & Low. 963.

(l) 2 Moo. & Scott, 634.

(m) 5 M. & W. 149; S. C. nomine *Pearson v. Yewens*, 5 Bing. N. C. 489.

(n) 1 Rose Bankt. Cas. 261.

(o) 3 Law Rec. N. S. 94.

(p) 10 Ad. & El. 570.

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Fitzgibbon replied.

Cur. ad. vult.

SAMUELS v. WILLIAMS.

In this case a detainer was lodged against the same defendant.

J. S. Close, on behalf of the plaintiff, moved for liberty to affix the name of the attorney of the plaintiff to the affidavit already on the file, made in order to ground a fiat. He cited *Nock v. Davis* (d); *Hopkins v. Salembier* (e); *Clutterbuck v. Wildman* (f).

Fitzgibbon and *Smythe* moved a cross notice that the fiat and the writ which issued in this case be set aside, on the ground that the affidavit on which they rested was defective in not having the attorney's name subscribed thereto; and they relied on the 207th General Rule, and cited *Phillips v. Hutchinson* (g).

Cur. ad. vult.

SEMPLE v. WILLIAMS.

In this case a subsequent detainer was lodged against the defendant, and the application made in it was for his discharge.

Cur. ad. vult.

(a) 2 Bur. 1048.

(b) 2 Bos. & Pul. 282.

(c) 2 B. & Ald. 743.

(d) Sm. & Batty, 276.

(e) 5 M. & W. 423.

(f) 2 Tyr. 276.

(g) 3 Dowl. P. C. 70.

PERRIN, J.

In the first of these cases the defendant applies to be discharged, he having been illegally arrested under a *capias* against Charles W. Williams, and under which he still is detained in prison. There is no doubt that the arrest and imprisonment are illegal, and that a Sheriff, under a writ against one man, has no right to arrest another. The party therefore who is so illegally arrested, and so illegally detained in custody, has a right to be discharged. The only Rule on the subject is the 17th New General Order, directing that "when the defendant is described in the *capias* or affidavit to hold to bail by initials or a wrong name, or without a Christian-name, the defendant shall not therefore be discharged out of custody, or the bail bond delivered up to be cancelled, if it shall appear to the Court that due diligence had been used to obtain knowledge of the proper name." That Rule does not warrant the Court in refusing the discharge, because it is plain there was no difficulty in ascertaining the defendant's real name; indeed no explanation is given of the manner in which the mistake occurred; but if that Rule does affect the present case, it would appear to imply that the defendant ought to be discharged, there being no affidavit that due diligence was used to ascertain his true name.

It being admitted the arrest was illegal, the application here is to amend or alter the writ by changing the name in it from Charles to Arthur, and thus to make it appear as if the defendant had been arrested under a writ conformable to the fiat, and by relation justify a wrong and take away the defendant's right of action and right of redress. It has been argued that the Court are bound to amend this writ, because there is the fiat to amend by, and that there is a just debt to be recovered; and in order to prevent vexatious actions against the parties concerned in this proceeding, that in the exercise of our discretion we are bound to make this alteration. In the Rules made by the Judges under the late Act of Parliament there is no Rule authorising or warranting such an amendment. It is said in *Tidd's Practice* that Courts will, in general, amend process where there is any thing to amend by; and in several of the cases cited, the leave to amend was

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granted, because otherwise the debt would have been barred by the Statute of Limitations; but there is no settled express rule of the Court authorising such amendment. In 2 *Wms. Saund.*, p. 63, it is laid down:—"The Court of Exchequer have allowed the omission of the day of the date of the return (to a writ) to be cured by amendment. The same Court also have allowed the writ of summons itself to be amended in order to save the statute, as by inserting the name of a co-executor as a co-plaintiff; but the Court of Queen's Bench has declined to act on the authority of these decisions:" *Roberts v. Bate (a)*. What weighs with me in refusing the present application is, that I cannot find a fixed rule on the subject. In many of the cases cited the defendant was discharged because he was arrested by a capias naming him by initials or by a wrong name. There is no definite principle in the cases, nothing but what has been called Judge-made law; and this being an application very extensive in its effects, and having an *ex post facto* relation so as to reverse the situation of the parties, and justify an illegal arrest and make it legal—to invalidate a resistance (if any were made) which would have been justifiable, I feel great difficulty in acceding to the application, unless there be very powerful reasons showing it would be unjust to act otherwise. This is not like an amendment of a pleading, but it is to alter a record of the Court, to direct and limit the power of the Sheriff or other officer when out of Court, and not within reach of its control. The importance of enforcing exact obedience in the execution of such process is very much affected by such applications as the present. That importance has been alluded to by Lord Abinger in *Finch v. Cochen*.

I therefore think it very important in reference to the duties of the officers in not exceeding the limits of the process directed to them, and the duty of the subject in submitting to that process, that respect due to that process should not be weakened or shaken by subsequent amendments justifying or validating unjust arrests. Where are we to stop in making such amendments? Is it where there has been violence or resistance used? How are inferior jurisdictions to be

(a) 6 Ad. & El. 778.

restrained? Is it to be understood that every Inferior Court is to have the power of altering or amending its process? I see great danger in opening a door to these consequences, when the error may be simply remedied by discharging the party, and imposing terms on him of not bringing an action. Why should we depart from that rule and alter the process of the Court after it has been executed and acted on, and so work a positive injustice?

It has been contended by the plaintiff's Counsel that by refusing this motion we deprive him of the security of the defendant's person, and it has been likened to the case of refusing an amendment when there would be an end to the debt by the operation of the Statute of Limitations; but there is no resemblance between the cases, because, by discharging the person, the debt is not endangered. The defendant has entered an appearance; and if the plaintiff have merits he will obtain a judgment. The defendant's absence will be but temporary; his going abroad is not his own motion; it is in the service of the Queen, and under her orders.

It has been ruled that an officer going on foreign service comes within the meaning of the 3 & 4 Vic. c. 105, therefore there was no ground for refusing the fiat; but I think there is a very serious objection to the course taken by the plaintiff in order to obtain this fiat. He has suppressed in his affidavit that the judgment was obtained under a warrant of attorney, and that there was a memorandum indorsed thereon—that the warrant was given to secure payment of £1658, with interest, by half-yearly payments of £50. Instead of being a warrant to enter judgment for the sum stated therein, it is a warrant to enter a judgment to secure the payment of an annuity of £100 per annum for sixteen years; and then there is an agreement that judgment may be entered; and if default be made in the payment of the annuity, that execution may issue. I have some doubt whether this latter clause have the effect of depriving the defendant of the benefit of the statute for the assignment of breaches; and if it do not, this is a misrepresentation by the plaintiff, and the defendant could not have been held to bail for more than the existing defaults. But whether or not it be within the statute, it is plain the annuity of

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 measuring the amount of bail to be given.

Upon the whole of the case, in my opinion, there is no affidavit of merits showing what the consideration for the debt was, or how contracted; and next, the manner in which the judgment is stated is manifestly and sedulously short; and the suppression of the agreement accompanying the warrant of attorney is such misconduct on the part of the plaintiff, that I do not consider this a case in which he is entitled to the extraordinary assistance of the Court, and in my judgment this amendment should not be allowed.

With respect to the second application, that the defendant be discharged from the detainer lodged by Samuels:—The objection there made was that one of the affidavits had not the attorney's name annexed to it. In my opinion that is an irregularity; but it was an irregularity to be dealt with by the Judge who granted the fiat. It does not invalidate the proceedings, and on that ground I do not think we should set aside the order.

With respect to the application in the third cause, it is resisted on this ground:—The party who issued the third writ, and had it executed, was in no collusion with the party in the first writ. The Sheriff having a party in custody, although illegally under a prior writ, is not the less bound to execute a legal writ delivered to him. He cannot deprive the plaintiff in that cause of his right to have that legal writ executed. I therefore think there is no ground for the defendant being discharged from the detainers in the second or third causes.

CRAMPTON, J.

In this case there are three actions and five notices of motion pending, and also five actions at law, brought in consequence of the arrest in the first cause, so that it must be admitted that this mistake has been a very fruitful source of litigation.

Before I consider the first motion I will make a few observations

respecting the fiat. With respect to it, it has been admitted that the order made was a valid order, and no motion was made to set aside that fiat; but even if all the facts which had been stated to have been suppressed from the affidavit were set out on it, I would nevertheless have granted the order. Judgment had been obtained in England, coupled with a stipulation enabling the defendant to discharge his debt by punctual payment of instalments; but there was a condition, if there was any default in the payment of these instalments, the plaintiff should be at liberty to issue execution on his judgment. Now, if execution had been issued in England, that execution would not have been set aside. Under these circumstances, even if this were a motion to set aside the fiat on the ground suggested, it could not avail; but I do not consider there has been any wilful suppression of facts, although they may have been stated rather shortly.

The fiat therefore being quite correct, a mistake is made on the face of the writ of *capias*, the effect of which was, that the defendant was arrested without a legal warrant, and his custody was, and is, consequently illegal in point of fact; and if there was not this motion to amend, it would be a matter of course to discharge him. It is clear that the arrest is a false imprisonment in point of law, although in point of fact the defendant was liable to be arrested; and I therefore conceive that the Sheriff, and all connected with the arrest, is liable to an action for false imprisonment.

The present application is one to the discretion of the Court, and although the Sheriff be legally liable to an action, he is guilty of no misconduct. That being so, the question then is, whether the Court should cure this misprision of the clerk? If the name in the writ had been right, the defendant would have nothing to complain of; but it has been said that he had a vested right of action, which would be a species of petty treason to deprive him of; on the other hand, if the Court was to comply with the defendant's motion, it would cause a very serious injury to the Sheriff, the plaintiff, and his attorney; for the attorney would not alone be liable to an action for false imprisonment, but he would also be liable to his employer for a breach of duty.

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Now, this will be irremediable if we do not make this amendment; and in order to prevent such irremediable mischief, I think this writ ought to be amended. Under these circumstances we are bound to exercise the discretion vested in us, and not to sacrifice substantial justice to mere form, as we have jurisdiction to do so beyond all doubt.

I will not go through the authorities; but from the case of *Brown v. Hammond* down to the case in 1 *Q. B.*, a period of one hundred years, there are frequent instances of amendments being made, and none of their being refused; and the rule of this Court, which has been referred to, shows that this practice has been recognised. I therefore see no ground for departing from the opinion before delivered by me.

However, it is contended that in consequence of a matter which has taken place since the motion was previously before the Court, that this amendment now sought for ought not to be made. That fact was, that pending this motion the defendant issues five writs against the parties concerned in this arrest on the very day the application was made to the Court of Exchequer.* With respect to that, it should, I think, be considered as a proceeding *pendente lite*. If the party had lain by, then the Court would not assist him; but under the present circumstances this case does not come under the rule relied on; and we should only be making the practice of this Court an instrument of legal oppression if we do not amend this writ, and thereby prevent vexatious and litigious actions, which would undoubtedly follow from the act. If the party were entitled to be discharged as a matter of right, we would have no right to impose terms on him of not bringing any actions, for these are equitable terms, imposed in a proper case.

On the second motion I concur with my Brother PERRIN. Perhaps I should have seen that the 207th Rule had been complied with; but that irregularity, even if it were open to the defendant, could not now be taken advantage of, as that defect has been supplied by the affidavits, which referred to it; therefore that motion for his discharge cannot be complied with.

* Vide *post*, 526.

On the third motion—that is, where the detainer was laid on while the defendant was in custody—I do not think the defendant is entitled to his discharge.

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Assuming that he was in unlawful custody, there was no collusion or privity connecting the plaintiff in the third cause with that illegal arrest; he therefore exercised his undoubted privilege, and lodged a regular writ with the Sheriff. It has been argued that because the first writ in the hands of the Sheriff could not operate to detain the defendant in custody, that therefore all subsequent writs should follow the same course. There are two distinctions which will reconcile all the cases. The case before Lord Eldon of *Ex parte Rose* strikes me as no authority. It was a case of privilege *eundo, morando* and *redeundo*. The first arrest in that case was made when the party was privileged. Now, that privilege is allowed to a party while discharging a public duty; and the Courts have always said a reasonable time must be given him *eundo, morando* and *redeundo*; and if the party do not go beyond the privilege so given to him, it is as much injured by the subsequent as the first arrest. Secondly, there is no principle better laid down than that if a party be in unlawful custody, not growing out of privilege, and if he be arrested by a third person unaffected by the illegality, that person has a clear right to detain him, otherwise he would be left without legal remedy. When a number of writs are in the hands of the Sheriff at the same time, one of them being a wrongful writ, and not warranted by the Court, and the others legal, and the Sheriff arrests the defendant, he would be in custody under all the legal writs, but not under the illegal writ. If he arrests under a wrongful writ, having good writs in his possession, no good arrest is made, for the other arrests are but constructive; therefore in such a case there is no arrest. Constructiveness does not exist in law, and the party is not in the custody of the Sheriff at all, but of a stranger. I would refer to the cases of *Barclay v. Faber* (a) and *Howson v. Walker* (b).

I think the amendment should be made, there being no authority against the jurisdiction of the Court so to do, but the plaintiff

(a) 2 B. & Ald. 743; S. C. 1 Chit. R. 579.

(b) 2 Wm. Black. 823.

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In *Page v. Williams* the first application is, that the defendant be discharged. That application is well founded, unless the Court amend the writ. The cross notice in *Page v. Williams* is, that the writ of *capias* may be amended, and made conformable to the fiat. I am of opinion that the Court has authority to make that amendment.

Judge MOORE, owing to the death of a relative, is unavoidably absent; but he has requested me to express his concurrence with the majority of the Court, and to intimate his reluctance in being obliged to yield to the authorities, and his disinclination to carry them further; and I must say I concur in that reluctance: there will be therefore no rule on the application to discharge the defendant, the plaintiff in the first cause paying the costs, and there will be an order to amend, the plaintiff also paying the costs.

In the case of *Samuels v. Williams*, I am of opinion that the objection to the affidavit for the omission of the signature of the attorney does not vitiate it, the rule being but directory; and that is shown by the 12 G. 3, c. 59, and the decisions upon it; consequently there will be no rule on the application to set aside the fiat and the writ, and no costs.

With respect to the detainer in *Simple v. Williams*, we are all of opinion the application to discharge the defendant fails.

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Per Curiam.

Let the writ of *capias ad respondendum* in this cause be amended, by changing the name of Charles Wellesley Williams appearing therein to Arthur Wellesley Williams. Let the defendant's application to be discharged from custody, as well in this case or from any subsequent or other detainers, be refused. Let plaintiff pay to the defendant the costs of the defendant's application and the costs of the motion.

SAMUELS *v.* WILLIAMS.*Per Curiam.*

Let no rule be made upon defendant's motion to set aside Judge's fiat and writ of *capias ad respondendum* issued thereon, in consequence of plaintiff's affidavit not having been signed by the plaintiff's attorney; and let plaintiff's application for liberty to amend said affidavit, by adding the attorney's name thereto, be allowed; but let plaintiff pay defendant the costs of the motion.

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LADY CLANMORRIS and C. WEBBER,
Executors of E. L. HICKMAN,

v.

WALTER LAMBERT.*

May 24.
June 8.

FITZGIBBON, on behalf of the plaintiffs, moved that they might be at liberty to amend the several writs issued and filed in this cause, bearing *teste* respectively the 16th of June 1848, and 25th of November 1848, by stating in the indorsements on the writs the date or *teste*, and the date of the return of the first writ issued in this cause on the 9th, and bearing *teste* the 1st of June 1848, so as to make said indorsements on said renewal writs conformable with the Act of 3 & 4 Vic. c. 105, s. 7, or for such other order, &c.

The Court will permit the amendment of writs if justice will be thereby furthered, and the Statute of Limitations would otherwise operate as a bar to the demand.

The affidavit on which the motion rested stated that a *capias ad respondendum* issued in this cause in June 1848, directed to the Sheriff of the county of Galway, in order to prevent the operation of the Statute of Limitations, on a debt due by the defendant to the plaintiffs as executors of Edward Shadwell Hickman (the defendant

* This case was decided in 1849, and is here inserted, as it was relied on in the argument of the previous case, as an authority for the Court amending the writ.

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at the time being out of the jurisdiction), and that on inquiry at the Seal and Appearance Office the practice in such cases was stated to be to issue a *capias*; and if it could not be served, the plaintiff's attorney was to indorse thereon a return of *non est inventus*, and to file same, and to issue renewals of such *capias* within one month from the return thereof; and if such renewal *capias* should not be served, a like return should be put thereon and filed, and so on until the defendant could be served.

That on the 9th of June a *capias ad respondendum* issued, tested the 1st day of June, directed to the Sheriff, and that on the 27th of June the said writ was filed in the proper office, with a return of *non est inventus* indorsed; and on the 27th of June a renewal *capias* issued, tested the 16th of June, and returnable the 1st of November. That the second writ was filed on the 28th of November, with a return of *non est inventus*, and on that day a renewal *capias* issued tested the 25th of November, and returnable on the 10th of January; and on the 26th of January same was filed, with a return of *non est inventus*, and on the 13th of January a further renewal *capias* issued, tested the 25th of November, and returnable on the 20th of January, when a copy of said writ was served on the said defendant. The affidavit then referred to some negotiation that had taken place between defendant's son and the attorney of the plaintiffs, and that the matter ended by the filing of the declaration, to which defendant pleaded the Statute of Limitations; and that when the replication was about to be filed, Counsel advised that the indorsements on the renewal writs were informal, as they did not contain a statement of the *teste* and return of the writ next previously issued, and that an application to the Court was necessary.

The two writs sought to be amended were renewal writs of a previous *capias ad respondendum*, which *capias* was founded on two bills of exchange, to which the Statute of Limitations would be successfully pleaded if we be debarred making these amendments.—[MOORE, J. Has the Court the power to deprive the defendant of the benefit of the statute?—We contend it has: *Williams v. Williams* (a); *Mavor v. Spalding* (b). The principle as to amend-

(a) 10 Mees. & Wels. 174, 476.

(b) 1 Dowl. & Low. 878.

ing writs is clearly laid down in a case of *Bilton v. Clapperton* (a) by Alderson, B.:—"The principle acted upon by the Courts appears to be this, that an amendment will not be allowed where the sole object is to save costs; but where the refusal to amend would deprive a party of his remedy, as where the Statute of Limitations would apply if an amendment were not made, or the plaintiff would suffer any material detriment if the defendant were discharged out of custody, there the Courts will allow the writ to be amended."—[MOORE, J. Your application is, that the attorney may indorse on the writ what he was entitled to do.]—*Wood v. Hume* (b). There all the cases are reviewed, and the conclusions legitimately arrived at lead to the inference that amendments such as those now prayed for are authorised by the Courts.

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Napier and *A. Vance*, contra.

This is an untenable application, for the Court is called on to add a date to these writs. The object of the section in the statute 3 & 4 Vic. c. 105, was to get rid of the old practice in making up the roll; that was resorted to to avoid the Statute of Limitations, and the statute itself can have no efficacy unless to substitute a reality for a fiction. If a party see by the date of his writ he has no case, he will act accordingly; but if the Court allow the amendments sought, that 7th section of 3 & 4 Vic. is nugatory. But there has not been an *alias* or a *pluries* writ issued here.—[MOORE, J. Are not all the proper writs on the file?—There are none on the file but common *capias* writs. It is laid down in a case of *Benson v. King*, cited in *Tidd. Prac.*, p. 161, 8th ed.:—"And where two latitats were sued out at different times for the same cause of action, and the defendant appeared upon the second, and signed a *non pros.* for not declaring, the Court ordered the continuances subsequently entered upon the first to be struck out, being of opinion that the first latitat was made an end of by the second; and if it were not so, the practice of the Court is clear and well settled, that the continuances must be by *alias* and *pluries*.—[CRAMPTON, J. I do not

(a) 9 M. & W. 473.

(b) 4 Dowl. & Low. 139, note.

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know if this Court hold it necessary that the second writ should notice the first.]—The words are in an *alias* “as before,” and in a *pluries* “as we have often.” A principle in making amendments is, that there must be something to amend, and to amend by. The instant the second writ issues, the first is at an end, and the Courts have never amended a void writ.

The effect of an amendment here would be to make an *alias* and a *pluries* for the party: *Campbell v. Smart* (a).—[MOORE, J. Do the writs on the file answer the words *alias* and *pluries* in the Act of Parliament?—CRAMPTON, J. We must grant this motion, explaining the effect of the alteration we make; but Mr. *Fitzgibbon's* client must pay the costs.

May 24.

*Per Curiam.**

Let the defendants be at liberty to amend the several writs issued and filed in this cause, and bearing *teste* respectively 16th of June and 25th of November 1848, by stating in the indorsements on said writs the date or *teste*, and the date of the return of the first writ issued in this cause; and let defendant pay the costs of this motion.

June 8.

Fitzgibbon again moved, on behalf of the plaintiffs, that the writ issued in this cause on the 27th of June, and bearing *teste* the 16th of June 1848, be amended by inserting in the body thereof the words “as we before commanded you;” and that the writ, issued in this cause on the 28th of November 1848, and bearing *teste* the 25th of November 1848, returnable the 10th of January 1849, be amended by inserting therein the words “as we often before commanded you;” and that the writ, which issued in this cause on the 13th of January 1849, bearing *teste* the 25th of November 1848, be amended by inserting the words therein “as we often before commanded you;” and by indorsing thereon the date or *teste*, and the

(a) 5 C. B. 196.

* The CHIEF JUSTICE was at Nisi Prius when the first motion was discussed.

date of the return of the first writ issued in this cause on the 9th, and bearing *teste* the 1st of June 1848; and that the return which appears on the back of the said writ, which issued in this cause on the 9th, and bears *teste* the 1st of June 1848, be amended by expunging the words "does not reside," and by inserting in their place the words "is not found;" and by adding to said return the words "within mentioned;" and that the returns on the back of said writs, bearing *teste* respectively the 16th of June and 25th of November respectively, be amended by adding to each of said returns the words "within mentioned." This motion rested on the three writs of the 1st and 16th of June and 25th of November, now of record in the proper office, and on the fourth writ issued on the 13th of January 1849, tested the 25th of November 1848, and returnable on the 20th of January 1849, which was served on the defendant, and on the several returns thereon, and on the previous affidavits, and the order made the 24th day of May last.

We only ask for what are mere formal amendments, by adding to the second and third writs what will make them *alias* and *pluries* writs. This was done in *Culverwell v. Nuges* (a), where, in order to save the Statute of Limitations, the Court allowed an *alias* and *pluries* writ of summons to be amended by inserting therein the date of the first writ and return thereto: *Lakin v. Watson* (b). That was a case of an amendment of a writ of summons by inserting the name of a co-executrix as co-plaintiff, on the ground that the right of action would otherwise have been lost, and this, even after a plea in abatement had been filed: *Williams v. Williams* (c). There, after the argument of a demurrer to a replication setting out continuances and writs in answer to a plea of the Statute of Limitations, the plaintiff was allowed to amend by stating the indorsement on the writs as containing the date as well of the return as of the writs, in conformity with the Uniformity of Process Act. The Court, on a subsequent application, also allowed the writs themselves to be amended accordingly.

(a) 4 Dow. & Low. 30.

(b) 2 Cr. & Mees. 685; S. C. 2 Dowl. P. C. 633.

(c) 10 Mees. & Wels. 476.

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Joy and Vance, contra.

To grant these amendments would be in effect to deprive the defendant of the benefit of the Statute of Limitations which he has pleaded, and to import into 3 & 4 Vic. c. 105, words that are not in it. The terms of the 7th section are mandatory; before the passing of the statute the practice was as laid down in *Monahan v. Brennan* (a); and in *Campbell v. Smart* (b) the Court refused to allow the dates of writs of summons to be altered for the purpose of preventing the plaintiff's claim from being barred by the Statute of Limitations. The Court of Queen's Bench, in *Roberts v. Bate* (c), refused to act upon *Lakin v. Watson*.—[BLACKBURN, C. J. Is there any case where the Court has amended the writ itself?—None; and the case of *Goodchild v. Leadham* (d) shows that no amendments will be made since the statute that could not have been made before its passing; then could the amendments now required have been made before the statute?

First, a return of *non est inventus* was necessary before the statute, and it is still necessary; for until it be made the Court has no jurisdiction to issue a second writ: *Harris, qui tam, v. Woolford* (e).

Secondly, they seek to convert the common *capias* into an *alias* and *pluries* writ, and the Court could not have done that before the statute: 1 *Tidd Prac.* p. 162; *Kenworthy v. Keppit* (f).—[PERRIN, J. The defendant has not been served with the first writ; and the section relied on says, "unless he be served therewith, and a return made of *non est inventus*." I think there is great difficulty in acceding to the motion.]

Fitzgibbon replied.

Amendments of this sort are in the discretion of the Court. If in this case the defendant had gained a right to plead the Statute of Limitations by the quiescence of the plaintiff, the Court might hold a strict hand over the plaintiff; but there has been no laches—nothing

(a) 7 Ir. Law Rep. 548, in the note.

(c) 6 A. & E. 778.

(e) 6 T. R. 617.

(b) 5 C. B. 196.

(d) 1 Exch. 706.

(f) 4 B. & Ald. 288.

but a mistake as to the practice. The return is substantially one of *non est inventus*, and there is nothing in 3 & 4 Vic. c. 105 to limit the discretion of the Court in making these amendments. Any amendments in furtherance of justice will be permitted: *Rennie v. Bruce* (a); *Mavor v. Spalding* (b); *Eccles v. Cole* (c).

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BLACKBURNE, C. J.

I certainly would feel difficulty in departing from the strict words of 3 & 4 Vic. c. 105, if this had been *res nova*; but there are authorities showing there is a discretion vested in the Court in analogous cases to the present, which authorises the correction of errors and omissions such as those suggested by the terms of this motion, where the bar of the Statute of Limitations would otherwise operate. I think the amendments sought are in furtherance of justice, and that this motion should be allowed on the payment of the costs by the plaintiff.

CRAMPTON, J.

The grounds of my concurrence are these:—It is plain that it was the intention of the parties to comply with all the requisites of 3 & 4 Vic. in order to prevent the Statute of Limitations operating as a bar; then the steps prescribed by 3 & 4 Vic. were substantially taken by the plaintiffs in pursuance of that object; and the sole necessity of the present application arises out of a slip made by the attorney in the manner of entering the steps he has taken. It has been the practice both in this country and in England to allow such amendments, when otherwise there would be a bar to the plaintiffs having an effectual remedy to recover a just demand; and indeed for almost all parts of this motion there is distinct authority. *Williams v. Williams* is an authority for amending the form of a return. *Kirk v. Dolby* (d) is an authority for amending a writ so as to make it correspond with the *precipe*; and here it is to be observed all the writs have been regularly issued, but they are

(a) 2 Dowl. & Low. 946.

(b) 1 Dowl. & Low. 878.

(c) 8 M. & W. 537.

(d) 6 Mees. & Wels. 636.

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LANEERT. making these amendments, otherwise the debtor will be exonerated
from the demand of the plaintiffs, and their attorney will be
onerated for a mere slip.

PERRIN, J., and MOORE, J., concurred.

Order made in the terms of the notice.

NOTE.—No provision has been made in 13 & 14 Vic. c. 18 (Process and Practice Act), for continuing the writ of summons by *alias* and *pluries* writs. That statute, by its 4th section, enacts, that nothing in the statute "shall interfere with or affect" 3 & 4 Vic. c. 105. Therefore the 7th section of that latter statute is in full operation; and it will be a question of difficulty what proceedings are now to be adopted to save the operation of the bar of the Statute of Limitations. Vide *Walker v. Collick* (4 Exch. 171); *Medlicott v. Hunter* (5 Exch. 34); *Pritchard v. Bagshaw* (2 Lown. Max. & Poll. 323).

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Exchequer.

PAGE v. WILLIAMS.

(*Exchequer.*)

June 2, 5, 6,
 7, 9.

THE defendant, whose name was *Arthur Wellesley Williams*, was arrested under a writ and warrant describing him as *Charles Wellesley Williams*. The writ issued under a fiat from the Court of Queen's Bench, in which the defendant was correctly named. An application was made to the Queen's Bench to discharge him; but there being only two of the Judges of that Court sitting, and they having differed in opinion as to his right to be discharged, as well as on a cross motion to amend the writ and warrant—

H. Smythe, for the defendant, obtained from this Court two writs of *habeas corpus*, directed to the Sheriff of the city of Dublin, and the Marshal of the Marshalsea respectively (there being some doubt as to the custody), in order that the question of the legality of the custody, and of the jurisdiction of the Court of Exchequer to discharge therefrom, might be examined into by the full Court here, the prisoner giving notice to the plaintiff, and to a subsequent detaining creditor. To these writs the Sheriff and the Marshal respectively made returns to the effect that the Sheriff had arrested, and the Marshal detained, the prisoner *Arthur Wellesley Williams* under a writ of the Court of Queen's Bench against *Charles Wellesley Williams*, and under a detainer by a third party, lodged subsequently to the arrest, against *Arthur Wellesley Williams*. There was also an affidavit of the plaintiff's attorney to the effect that the prisoner was the person intended to be arrested.

The Court of Exchequer, whether the full Court in Term, or a single Baron in Vacation, has not jurisdiction by *habeas corpus* to discharge a prisoner in custody "by process in any civil suit." *A. W. W.* was arrested under a writ of the Queen's Bench (on *mesne process*), erroneously describing him as *C. W. W.*; a detainer was subsequently lodged by a second creditor, naming him correctly. *Held*, that under the detainer the prisoner was in custody "by process in a civil suit," and that therefore this Court could not discharge him on *habeas corpus*, although the arrest and custody under both the first

writ and under the detainer were illegal.—*Held*, by *PROCTER, C. B.* (*dissentiente LERNOY, B.*), that but for the detainer the prisoner would be entitled to be discharged.

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Accordingly *Fitzgibbon* (with whom was *H. Smythe*) now moved that he be discharged.

A *capias* had issued against *Charles W. Williams*, the Sheriff had therefore no authority to arrest, nor the Marshal to detain, *Arthur W. Williams*. The arrest was irregular, and the custody illegal: *Reynolds v. Hankin* (a); *Coles v. Gunn* (b); *Hoye v. Bush* (c); *Finch v. Cocken* (d). *Howell v. Coleman*, and that class of cases, were cases of merely defective name. If the defendant in this case had killed the plaintiff, it would be only manslaughter.—[PENNEFATHER, B. Is there any case where one Superior Court has been called on to interfere in a summary way with the process of another? There is no other difficulty in the case.]—The prisoner claims the interposition of this Court as a right under the 56 G. 3, c. 100, s. 2, which gives the Court of Exchequer the Common Law jurisdiction of the Queen's Bench and Common Pleas. As to the detainer, if he be entitled to his discharge from the first writ, he is entitled to be discharged from the detainer also: *Barratt v. Price* (e); *Pierson v. Yewens* (f); *Collins v. Yewens* (g). *Robinson v. Yewens* (h) may be relied on on the other side; the ground of that decision was, that the bailiff, when he arrested the party, was a stranger to the Sheriff.

Macdonogh and *Hayes*, contra.

The *habeas corpus* is bad in form. It should be the *habeas corpus ad subjiciendum*, whereas it is the common *habeas corpus cum causa*.—[PIGOT, C. B. The exigency of the writ is right, though it is informal.]—This Court has no jurisdiction at Common Law to issue the writ of *habeas corpus*: 4 *Bac. Abridg.* p. 117; 4 *Com. Dig.*, p. 431. And the 56 G. 3, c. 100, the object of which was to extend the protection of this writ to persons under illegal restraint by private individuals, excepted from its operation persons in custody under civil or criminal process: judgment of Patte-

(a) 4 B. & Al. 536.

(c) 2 Sc. N. R. 86.

(e) 2 M. & Sc. 634.

(g) 5 M. & W. 149.

(b) 8 Moo. 526.

(d) 2 C. M. & R. 200.

(f) 7 Scott, 435, 471.

(h) 10 Ad. & El. 570.

son, J., in *Carus Wilson's case* (a). Therefore when it is returned to this Court that the prisoner is in custody under the civil process of another Court, its jurisdiction is gone.—[PIGOT, C. B. Is he in custody under that process which does not name him? The test of the custody is not the return, but the writ and the warrant. If he is not in custody under these, the exception in the statute does not apply.]—He was taken under civil process from the Queen's Bench, and is the person intended to be taken. This Court cannot interfere: *Re Andrews* (b); *Ex parte Cobbett* (c). This is an attempt to make one Superior Court a Court of Appeal from another: *Ex parte Strong* (d). Besides we are entitled to have the writ amended by the Court from which it issued, and the prisoner is in custody under a legal detainer: *Stevenson v. Danvers* (e); *Bilton v. Clapperton* (f); *Plock v. Pacheco* (g).

The writ of *habeas corpus ad subjiciendum* derives its authority from three sources:—first, from the Common Law; and when issued at Common Law, if the return to it, whether true or false, be sufficient, the Court is bound by it: *Wilmot*, p. 107; secondly, from the 31 *Car.* 2, c. 2, commonly called the *Habeas Corpus* Act, which applies only to criminal cases; and thirdly, from the 56 *G.* 3, c. 100, which extends the operation of this writ, and enables the Court to deal with the case not only on the return, but on affidavit, “as to justice shall appertain.” In *The Canadian Prisoners' case* (h) the return was held conclusive. It is sufficient that the Court should see that the party is in custody under the process of a Court of competent jurisdiction to prevent its interference, and the Court is bound by the return: *Brass Crosbie's case* (i); *Flower's case* (k); *Sheriff of Middlesex's case* (l); *Bethel's case* (m); *Rex v. Suddis* (n); *Cobbett's case* (o). But it is conclusive that the

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(a) 7 Q. B. 1010.

(c) 5 C. B. 418.

(e) 2 Bos. & P. 109.

(g) 9 M. & W. 342.

(i) 3 Wil. 181.

(f) 11 Ad. & El. 373.

(n) 1 East, 306.

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(b) 4 C. B. 226.

(d) 5 Dowl. P. C. 214.

(f) 9 M. & W. 473.

(h) 9 Ad. & El. 731.

(k) 8 T. R. 314.

(m) 1 Salk. 348.

(o) 7 Q. B. 187.

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T. T. 1851. prisoner now appears to be in custody, not only under the first writ,
Exchequer. but under a second, correct in every particular.

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H. Smythe, in reply.

We rely altogether on that portion of the 2nd section of the 56 G. 3, c. 100, by which "a like power" is conferred on the Court of Exchequer "as the Courts of Queen's Bench and Common Pleas have in Term." These latter Courts have at Common Law a jurisdiction by *habeas corpus* in civil and criminal cases in Term; and the statutes on the subject were not intended to modify this Common Law right: 4 *Bac. Ab. Hab. cor.*, B. All the text-writers ascribe to the Court of Exchequer, under the 56 G. 3, c. 100, the same jurisdiction which the other Courts possessed at Common Law; and in *The Canadian Prisoners' case* (a) this jurisdiction was exercised without question, though on the face of the return in that case the prisoners were "convict in execution." A similar jurisdiction was exercised by the Court of Exchequer in this country in *Higgins's case* (b), which came first before the Court of Common Pleas; and the Court of Exchequer afterwards, on *habeas corpus*, entertained the question of the legality of the custody. Such is the duty of the Court: *Bac. Ab. Hab. cor.*, B; *Bushell's case* (c); *Com. Dig. Hab. cor.*, B. In *Andrews' case*, and *Ex parte Cobbett*, cited on the opposite side, the custody appeared on the face of the returns to be legal. Here the warrant is void as a cause of detainer: *Hoye v. Bushe* (d); *Rex v. Sheriff of Surrey* (e); *Wilks v. Lorek* (f).—[PENNEFATHER, B. The strength of your argument is, that we are not called on to examine any thing the Court of Queen's Bench has done, but what has been done under the order of that Court.]—All the Superior Courts have now jurisdiction to entertain the question of legality of the detention, though not of the process; and it is conceded that the prisoner was illegally imprisoned. If so, the detainer is void: *Carson v. Southwell* (g). The distinction is,

(a) 5 M. & W. 32.

(b) 9 Ir. Law Rep. 414.

(c) Vaugh. 135.

(d) Judgment of Tindal, C. J.

(e) 1 Marsh. 75.

(f) 2 Taunt. 392.

(g) 9 Law Rec. N. S. 94.

if the first process be set aside merely for irregularity, a regular detainer is not affected; but if the first be wholly void, the detainer follows its fate: *Magrane v. Blake* (a); *Pierson v. Yewens*; *Collins v. Yewens*. *Robinson v. Yewens* is distinguishable, as there the arrest was not illegal by *the act of the Sheriff*: judgment of Parke, B. Here the arrest is illegal *ab initio* by the act of the Sheriff, therefore the subsequent detainer does not authorise the detention of the prisoner.

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The Court at its rising intimated a desire to hear further argument by one Counsel at each side on the question of the effect of the detainer.

Macdonogh.

In *Magrane v. Blake* the same party was the original and detaining creditor. *Crowden v. Walker* (b) is undoubtedly law. Our propositions are three:—First, there is a distinction between the case of detainers in the hands of the Sheriff at the time of the arrest, and of detainers subsequently lodged. Secondly, even though the arrest be irregular, a detainer lodged by an innocent party without collusion is good. Thirdly, they cannot raise the question of collusion on *habeas corpus*. In *Barratt v. Price* the detainers were in the hands of the Sheriff at the time of the arrest. In this case the detainer was lodged subsequently to the arrest, and under it, describing the prisoner correctly, he is detained; then the Court will not discharge him from the detainer, unless collusion with the first execution creditor be shown: *Calloway v. Bond* (c); *Davis v. Chippendale* (d). The process here is not void, because the defendant might waive the defect; and if he did not come in to apply for his discharge before the time formerly allowed for pleading in abatement in case of misnomer had expired, he should not be discharged: *Binfield v. Maxwell* (e); *Smith v. Patten* (f); *Kingston v. Llewellyn* (g). But even though the first writ be set aside, the return

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(a) Ir. T. R. 563.

(b) 2 W. Black. 823.

(c) 1 Chit. 580, n.

(d) 2 Bos. & P. 282.

(e) 15 East, 159.

(f) 6 Taunt. 115.

(g) 1 Brod. & B. 529.

T. T. 1851. specifies that the Sheriff arrests and detains the prisoner under the
Exchequer. second, and the Court will not discharge from that unless collusion be
 PAGE shown, on the authority of *Crowden v. Walker*. In an action of tres-
 v. pass against the Sheriff it would be a good plea confessing the trespass
 WILLIAMS. on the original arrest, but justifying the keeping in custody from
 the time of the delivery of the detainer. But the Court can in
 addition deal with the case on affidavits: 4 *Bac. Abridg. Hab.*
cor., B; and here it is not denied that the right person is arrested,
 and it is not compulsory on the Court to discharge him: 1 *Chit.*
C. L., p. 122. *Collins v. Yewins* shows that there is a distinction
 made between detainers in the hands of the Sheriff at the time of
 the arrest, and those lodged subsequently.

Fitzgibbon, in reply.

Barratt v. Price is a clear authority that if the first arrest be
 illegal, all detainers are invalid. No such distinction as contended
 for on the other side is there made: *Ex parte Ross* (a). *Davies v.*
Chippendale was a case where the first arrest was not void. In
Crowden v. Walker there was no privity between the Sheriff and
 the officer. The criterion is, whether the arrest is illegal by the act
 of the Sheriff? If it be so, the detainers are invalid. As to the
 jurisdiction of this Court, *Carus Wilson's case* shows that a single
 Baron in Vacation possesses the Common Law jurisdiction of the
 Courts of Queen's Bench and Common Pleas. That jurisdiction is
 conferred upon the full Court in Term by the 2nd section of 56
G. 3, c. 100, which does not contain the exception found in the 1st
 section. The Court of Exchequer in England dealt with *The*
Canadian Prisoners' case, which was a case of treason, excepted
 from the operation of the "*Habeas Corpus Act*;" the jurisdiction
 therefore exercised by them must have been that at Common Law:
Wilmot, p. 95. The only question for the Court is, whether the
 prisoner is illegally in custody? and if so, it is bound to discharge
 him by *habeas corpus*, which is "a writ framed to litigate not fact,
 but law:" *Wilmot*, p. 107. We do not complain of the process of
 the Queen's Bench, but of the prisoner's having been illegally

(a) 1 Rose, 260.

arrested by colour of process from the Queen's Bench. As to the detainer, the Marshal could not have arrested the prisoner under it, and therefore if the first arrest does not enure to it, he cannot detain the prisoner under it.

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The object of the 2nd section of the statute was to confer on the Court of Exchequer the Common Law jurisdiction of the Courts of Queen's Bench and Common Pleas, and these Courts had power at Common Law to issue the writ of *habeas corpus* to bring up a person in custody under civil process.—[LEFROY, B. There is no case to that effect.]—Because the Court had also power on motion to grant a remedy in a case like the present. The true question however, is, is the custody legal? In all the cases cited on the other side the custody was legal, but in this case the party cannot be said to be in custody under the writ at all: *Hoye v. Bushe*; and the arrest having been illegal by the act of the Sheriff the detainer is void also. There is a distinction between the case of arrest by *mesne process* and the ordinary case, because in the latter the prisoner had the opportunity of pleading in abatement.—[PIGOT, C. B. If the prisoner is held in custody "by civil process" under the detainer, and we have no jurisdiction in cases of custody "by civil process," can we discharge him from the detainer?—There has been no caption under the detainer, and it must stand or fall by the legality of the arrest under the first writ.

PIGOT, C. B.

This case has given rise to a great deal of discussion, though not to more than its importance deserved; and the conclusion at which the Court has arrived is, that it does not feel itself at liberty to discharge the prisoner. It is unnecessary to recapitulate the facts of the case, but I shall advert to some of the topics principally urged on our attention. Two distinct questions are presented by the return to the writ of *habeas corpus*—one relating to the original arrest, the other to the detainer. The case was originally argued upon the jurisdiction of this Court to discharge from the first; and if it stood on that alone I should hold (though perhaps the opinion is

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extra-judicial) that the jurisdiction exists, and that the Court would be bound to exercise it. But whether this jurisdiction arises under the provisions of the 56 G. 3, c. 100, or exists at Common Law, in the absence of any precedent that Courts have dealt by *habeas corpus* with the case of arrest *under civil process*, and taking into consideration the exception in the 56 G. 3, c. 100, and the previous Act of 31 Car. 2, c. 2, analogous to the Irish Act of 21 & 22 G. 3, I am of opinion that it does not extend to the case of an arrest "by civil process." In inquiring then whether the case of the arrest under the first writ is one suitable for the exercise of the writ of *habeas corpus*, it must be considered not only whether that arrest is illegal, but whether also it is "by civil process." These two questions are identical in the consideration of the arrest under the first writ; they are not so in that of the second. If the first arrest was made under the process of the Court of Queen's Bench, then this Court has no right to interfere with the act of a Court of civil jurisdiction exercising its functions within the limits of its jurisdiction. But what we have to consider is not whether that Court was warranted in authorising the arrest, but the question is, whether the writ from the Queen's Bench, being perfectly legal, the arrest and custody are really under it? That the arrest and custody are illegal, there is no doubt. This question of illegality has come before the Courts in a variety of shapes, and has been decided in the same way in all. In *Cole v. Hinson* (a) it has been held that false imprisonment lies for an arrest under a wrong name. *Shadgett v. Clipson* (b) is an authority to the same effect. In *Wills v. Lorck* the Court discharged a person arrested by a wrong Christian-name on summary motion. The same principle was affirmed in *Hoye v. Bushe*, and in *The King v. The Sheriff of Surrey*. In all these cases no question existed as to the identity of the party, and yet the proceedings were held illegal. Again, there is an opportunity of testing the matter by reference to the correlative duty of the Sheriff. Thus in *Morgan v. Bridges* (c) it was held that an action would not lie against the Sheriff for the escape of a person arrested by a

(a) 6 T. R. 234.

(b) 8 East, 529.

(c) 1 B. & A. 647.

wrong name, although the Sheriff knew he was the person intended, and refused to detain him. *Brunskill v. Robertson* (a) and *Finch v. Coken* are to the same effect. The principle of all these cases is, that a writ specifying one person gives no authority to detain another person of a totally different name; the act is outside the authority of the writ; and when the custody is once held to be unlawful, it appears to me to be a confusion of ideas to treat the party as in custody at all under a caption without authority. It is argued that, although the caption was not according to the exigency of the writ, still we should hold that it took place *because* of it—because the prisoner is in fact in custody by reason of a process issued for the purpose of arresting him, and he is the person intended to be arrested. But the question is, is the arrest the act of the Court of Queen's Bench? and of that the test is the language of the writ. *Finch v. Coken* is exactly in point, and is decisive of this question. That case was dealt with by reference to the Act of 23 Hen. 6, c. 9, which authorised the Sheriff to admit to bail every person in custody "by force of any writ;" and the Court decided that though the party was in custody by means of the writ, and although he was the person intended to be arrested, yet that he was not in custody "by force of the writ" according to the provisions of the statute of Hen. The language of 56 G. 3, c. 100, is "by process in any civil suit," and that of the Act of Hen. 6, "by force of process." The difference in the language is not sufficient to ground a difference of construction with respect to the two Acts. In that view of the case I should be of opinion that this is not an imprisonment "by process in a civil suit," and not by any act of the Court of Queen's Bench, but by the wrongful act of the officer, without colour of authority from any Court.

The protection to "civil process" given by these words is as applicable to the process of the lowest Court as of the highest. This is not distinguishable from an arrest by process of an Inferior Court, nor from a case where there is no likeness at all in the name. The same rule exists also in criminal jurisdiction as well as in civil. The highest authority has been cited for the proposition, that an act

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(a) 9 Ad. & El. 840.

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the party sought to be arrested is wrongly named, amounts to manslaughter merely, not to murder; and the best reasons have been given for this. The officer should know from the process whom he is to arrest, and the party what he is to obey; the process should therefore correctly describe the individual. How does this principle hold with reference to Courts of inferior jurisdiction? Suppose the case of a Manor Court decree, in which there is a misnomer, or suppose J. S. arrested under a decree against J. B.—if there be not power by writ of *habeas corpus* to entertain such a question, how can the validity of the arrest be inquired into? unless indeed there exists in the Seneschal of the Court a power to review his process, which, if it do exist, it is very questionable whether he could exercise except while actually sitting in his Court. But suppose such a case in the Assistant-Barrister's Court—he has no jurisdiction except during the sitting of his Court; and if such a case were not examinable by *habeas corpus*, a person might be wrongfully deprived of his liberty during the whole interval between two sessions. I am therefore of opinion that if the question of arrest and custody depended on the first writ alone we should be authorised and bound to discharge the prisoner, there being no arrest nor custody “by process in a civil suit;” and in so doing we should not be interfering with the Court of Queen's Bench. As to the argument that we should thus prevent that Court remedying the mistake in the writ by amending it, we cannot take that topic into consideration.

The next question is as to the detainer, under which it appears by the return the prisoner is held in custody. There has been much argument on both sides on the proposition, that where the original arrest is illegal by the act of the Sheriff, that infects and vitiates all detainers, as well those in the hands of the Sheriff at the time of the arrest as those lodged subsequently. That appears to me to be *res judicata*. But if it were not so, the principle is plain, nor should I allude to it but that it has been attempted to distinguish this case from *Barratt v. Price*. Irrespective of that authority, look to the terms in which the principle is laid down in *Frost's case* (a):

(a) 5 Coke, 89.

“where an arrest has taken place under process, it is unnecessary to make fresh arrests for the purposes of writs subsequently lodged, because the existing arrest enures to all writs in the hands of the Sheriff then and afterwards.” That position applies to process in the hands of the Sheriff, whether lodged before or after the arrest; we must therefore consider the nature of the custody without reference to the time at which the detainer is lodged; and if it be unlawful in itself, it is so in reference to the detainer also, because there is no second arrest under the detainer; the custody under it derives its legality from that of the previous custody. These appear to be the principles of law applying to this part of the case; and if these be correct, it is immaterial whether the illegality arises from the misconduct of the Sheriff in his own act being illegal, as in *Pierson v. Yewens*, or in the privilege of the party arrested, as in *Spence v. Stewart* (a). In *Ex parte Ross*, Lord Eldon’s language is very strong. He says:—“It has been repeatedly determined that if the arrest is bad, all the other writs are rendered inoperative as detainers; nor can there be any difference whether such writs were lodged before or after the arrest. It is the arrest alone that gives efficacy to the detainers; and if it be illegal, it can give effect to nothing.” In *Barrack v. Newton* (b) Patteson, J., says:—“The distinction is this: if a man is taken on the only writ in the Sheriff’s office, and that writ is bad, detainers lodged afterwards are also bad; but if there be fifty writs in the office, and the Sheriff arrests on one, the supposition of law is, that he arrests on all at once; and if the one be bad, the rest are not vitiated, unless the Sheriff himself has been guilty of some misconduct.” But the decision in *Barratt v. Price* must be considered as final, having met the approval of all the Courts; and it decided that detainers founded on an illegal arrest were illegal also. This case has been cited with approbation in the Common Pleas in *Pierson v. Yewens*; in the Queen’s Bench, in *Collins v. Yewens*, and in the Exchequer in *Robinson v. Yewens*. On these authorities, if we had jurisdiction to entertain the question of the subsequent detainer, we should hold it bad, and discharge the

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(a) 3 East, 89.

(b) 7 Q. B. 529.

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prisoner. But it is impossible to entertain that question without going into matter exclusive of the question of validity. We have here a regular writ of the Court of Queen's Bench giving authority to arrest and detain the prisoner. We find him in custody under a warrant, correct as to his name. Having therefore a writ of a Court of competent authority, and finding that the prisoner is in custody under such writ, we have the case of a prisoner in custody "by process in a civil suit." He may be in custody illegally, but that is not the question. That question is withdrawn from our jurisdiction by *habeas corpus*, because the officer has acted in apparent obedience to the authority of the "civil process" of a Court of competent jurisdiction. Suppose the prisoner had discharged himself from liability under the first writ, would it be competent for us on the Marshal's statement, that he had held the prisoner in custody under the first writ, and that he now detained him under the second, the first writ not being before us, to enter on the question of the legality of the second writ? Finding the prisoner alleged to be held in custody by that writ, and apparently so, we have a case within the exception of the 56 G. 3, and in which we cannot interfere with the process of a Court of competent jurisdiction. To that Court belongs the investigation of the irregularity of its process, and this appears to be the very question intended to be withdrawn from our jurisdiction by *habeas corpus*.

A question of difficulty arises from the want of authority on the subject, viz., whether, if we are correct in holding the arrest under the first writ bad, we have a right to deal with it, leaving the second writ untouched? Acting on the analogy furnished by the "*Habeas Corpus Act*," I think we have such right. That Act enables the Court to discharge a party imprisoned on illegal criminal process, detaining him on civil; and coupling that with the closing paragraph of the 3rd section of 56 G. 3, c. 100, which enables the Judge to deal with "the subject-matter as to justice shall appertain," we may so deal with the prisoner as if he were now in imprisonment under an alleged criminal process which was illegal; discharging him from that, we may retain him on the "civil process."

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It is not my intention to enter at length into the several matters so fully discussed by my LORD CHIEF BARON, nor, in the view I take of the case, is it necessary to do so. I shall not consider how far the original arrest was unlawful. It is sufficient to state that it cannot be justified without saying how far a subsequent detainer, if a proper course had been taken, might be infected by its invalidity. It appears to me that if the original arrest be unlawful by the act of the Sheriff, or of any officer acting under him, the second arrest or detainer cannot be sustained.

But the question here is beside the merits of these two propositions, and must be decided on a consideration of the Act of the 56 G. 3, c. 100, and the construction which is to be put on it with reference to the jurisdiction of this Court. That Act was passed for the purpose of relieving the subject in cases of unlawful arrest without any criminal charge, and not under civil process. Mischiefs had been occasioned by false imprisonments of persons by individuals without colour of law; and the Act to remedy that state of things provides, amongst other things, that it should be lawful for any Judge to issue a writ of *habeas corpus* in Vacation in cases other than criminal, which were the subject of the former *Habeas Corpus* Act, excepting also cases of arrest under civil process; so that a Judge in Vacation has no jurisdiction to issue this writ when the prisoner is arrested in a civil suit. But it has been argued that by the 2nd section a more extensive jurisdiction has been conferred on the Court of Exchequer sitting "in banc." in Term; and that whatever jurisdiction had been previously enjoyed by the Queen's Bench and Common Pleas was thereby extended to the Court of Exchequer, which thus acquired the same right of exercising its jurisdiction in any cases of detention as the other Courts had at Common Law. In support of this proposition, *The Canadian Prisoners' case* and *Higgins's case* were pressed upon us. I do not quarrel with these decisions, which appear to be correct as to the questions they determine; but they do not touch this case. Neither would I be understood as saying that this Court may not in Term have jurisdiction equal to that of the Queen's Bench or Common

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Pleas which it would in a proper case exercise. But in this case, where "civil process" intervenes, I think the construction to be put on the authority which the Court ought to exercise is to be governed by the 1st section of the Act, and that the Court ought not to interfere where the single Judge is prohibited; and I found this opinion on the general purview of the Act, and also upon a consideration of the provision which, in cases where the application for discharge is made so late in Term that the Court cannot dispose of it during the Term, enables them to refer it to a single Baron sitting in Vacation. If then we are to come to the conclusion that the full Court in Term has a jurisdiction different from that of a single Baron in Vacation, we should be saying that this writ is to be disposed of in one way in Term and in another in Vacation. This conclusion, involving such contradiction, should not be adopted unless under the compulsion of the highest authority. No such has been produced; we must therefore adopt the conclusion that, as to civil suits, the same conclusion is to apply to the authority of the full Court in Term as to that of a single Judge in Vacation.

This brings us to the 1st section of the Act, and the construction to be put on it; and I own that if the case rested on the first writ alone, I should have felt difficulty in saying that the defendant was imprisoned "by process in a civil suit." The process was not issued against him by name; he was no doubt the person intended; but the authorities are so strong, especially that of *Finch v. Cocken*, that I could not say that the prisoner was in custody under a writ not naming him. But it is not necessary for me to give any decided opinion on that point, more especially as my Brother LEFROY thinks that the imprisonment does come within the words of the statute, and that even under the first writ the prisoner is in custody "by process in a civil suit." He was taken, no doubt, *under colour* of civil process; he is the person intended to be arrested by that writ, and it may therefore, perhaps, be considered that he is in custody *by virtue* of it. But it is unnecessary for me to discuss this matter, because I am clearly of opinion that he is in custody "by process in a civil suit" under the second writ, and this Court ought not to interfere with that process. If he be not *properly* in custody, his course is to renew his application

to that Court out of which the writs, under which he is detained, issued. Our jurisdiction is taken away by the exception in the 1st section of the Act, when we find him in custody "by civil process," whether properly or not; that he is so there is no doubt. It was argued that the Marshal could not detain the prisoner under the first writ. But could he discharge him while the detainer was in his hands? I therefore think he is in custody "by process in a civil suit," and that this Court ought not to interfere. If a single Baron in Vacation could not interfere, the Court in Term cannot. This view does not clash with *The Canadian Prisoners' case*. I do not say that this Court may not have a general jurisdiction by *habeas corpus*, provided the prisoner is not detained in custody under a criminal charge or in a civil suit.

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LEFROY, B.

My view as to one of the questions in this case having been alluded to by my Brother PENNEFATHER, it is not necessary for me to go into it at length; with that shade of difference I fully concur in his accurate judgment. It must be admitted that we are to look for our jurisdiction by *habeas corpus* to the Act 56 G. 3, c. 100. From it we derive an authority, in common with the Queen's Bench and Common Pleas, whether acting in full Court, or by a single Judge, which we had not before. It is said that the Queen's Bench and Common Pleas possess a jurisdiction independent of the Act, which would authorise them to exercise the authority we are now called upon to put in force; but no instance has been cited, and, after a careful search, I can find no case in which either of these Courts, in the exercise of this jurisdiction, discharged a person in custody under civil process, on the ground that the arrest was illegal; therefore, independent of the Act, and supposing this Court had equal jurisdiction with the Courts of Queen's Bench and Common Pleas, when no instance of the exercise of such jurisdiction by them can be adduced, this absence of precedent to my mind amounts almost to a decisive authority of the absence of the supposed jurisdiction.

How much stronger then will be the argument when, in addition, we find, in an Act intended to *enlarge* the privilege of the subject,

T. T. 1851. an exeception on the very point in question?—the Act which gives
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 us our authority, excepting on the face of it the case of custody by
 civil process. It is true this exception is contained in the 1st section
 only, but I cannot add to the argument of my Brother PENNEFATHER
 to show the absurdity of confining it to that section.

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There is much of the argument for the defendant which I need not controvert. I admit the arrest was illegal; but then the question of fact arises, was it a custody by process in a civil suit? Did the Legislature mean to confine the exception in the Act to the case of an arrest by *legal* process? If so, suppose a person in custody by *legal* process, of what use would his *habeas corpus* be to him? What Court would in such case discharge him? It is therefore impossible to confine the exception in the Act to the case of *legal* process; the Legislature must have contemplated a *de facto* custody under whatever description of civil process. Well, what is the case here? The officer avows the authority under which he arrested the prisoner, and that on the face of it purports to be a civil process. If the construction of the Act be such as I have given, and if under its provisions alone we can exercise this jurisdiction, we are clearly debarred from doing so in the present case. What then becomes of the question of hardship? If it were a question of the arrest of a person not the subject-matter of the writ—a stranger to it—there would be some ground for the complaint of hardship. But here the prisoner is the right person; and I confess I do not feel very strongly the hardship of an imprisonment of the right person by a wrong name. It is most desirable that the process in all cases should be precise; and in this case the party guilty of the irregularity will no doubt suffer in another way. But the question for us is, has the Legislature provided this species of remedy, enabling the Court to discharge the prisoner from arrest? We have had the case put (and strongly) of the inconvenience of this Court interfering where the Court of Queen's Bench has refused to discharge the party. He has the opportunity of obtaining relief in that Court, to which the case more properly belongs. The writ of *habeas corpus* is a valuable remedy for the subject in cases where none other exist. Here the party has as speedy a remedy in that Court from which

the writ issued, and that is the tribunal to which he should apply. We have not jurisdiction in the matter; and neither from the first writ nor from the detainer do I consider that we can discharge the prisoner.

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Lessee SCULLY v. MURPHY.

H. T. 1851.

Feb. 21.

MURPHY moved for an order to renew an *habere* where less than the year's rent for which the ejectment was brought remained due.

The execution of the *habere* was suspended in consequence of the tenant having agreed to pay the rent; but he had paid but a portion of it, and was now carrying away the crops. The Ejectment Statutes only require that a year's rent should be due at the time the ejectment is brought.—[PENNEFATHER, B. But the practice of the Court requires that an affidavit should be made that a year's rent is due at the time of issuing the *habere*.]—The practice of the Court might be made an instrument of fraud if exercised on behalf of a tenant who had been granted a favour by being allowed to remain in possession, and who had contracted to pay the rent if granted that favour.

Conditional order granted to revive a judgment in ejectment, there being less than a year's rent due, where the tenant guilty of bad faith towards the landlord.

PENNEFATHER, B.

Take a conditional order to revive the judgment.

E. T. 1851.

Exchequer.

EDWARD COURTENAY

v.

GEORGE ADAMS.

April 26.

Where a party gives peremptory undertaking to go to trial under the 112th New General Order, and fails, order for judgment as in case of nonsuit absolute in the first instance.

HARRIS moved for an order for judgment as in case of nonsuit. In this case a conditional order had been obtained for judgment as in case of nonsuit; the plaintiff thereupon furnished the defendant with a peremptory undertaking to go to trial at the next Assizes, pursuant to the 112th New General Rule, and thereby the conditional order stood discharged under the provisions of said Rule.

The plaintiff did not go to trial pursuant to his undertaking; it was therefore urged that the order should now be absolute in the first instance.

PIGOT, C. B.

The circumstance of not going to trial is a "fact," and the other side should have an opportunity of answering it; the order should therefore be only conditional in the first instance.

Harris.

That "fact" is stated in our affidavit, and the other side have had notice.

PIGOT, C. B.

Under these circumstances, I may perhaps make the order in this case.

E. T. 1851.
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THOMAS GALLOGLY *v.* ARTHUR ORMSBY.

April 29.

ACTION against the High Sheriff of Mayo for a false return. The declaration contained three counts:—

First—"Having seized to the full amount of the execution, and then forbearing to sell, and falsely returning goods on hands for want of buyers."

Secondly—"Seizing for only a small amount of the execution, and falsely returning no other goods in his bailiwick."

Thirdly—"Not levying the amount of the writ, although sufficient goods in his bailiwick."

Plea—General issue.

The action was tried before the LORD CHIEF BARON and a special jury in the Sittings after Trinity Term 1850. Verdict for the plaintiff. Damages £170.

On the the trial it was proved in evidence on the part of the plaintiff, as appears from the bill of exceptions, that the plaintiff had recovered a judgment as of Michaelmas Term 1845, for the sum of £2000, against one Peter Bourke, Sub-sheriff of the county of Mayo; and that on the 3rd of May 1849 a writ of *fiери facias* was delivered to the defendant for execution upon the said judgment to the amount of £1212. 11s. 4d. An attested copy of the writ and return thereon was proved; also that a certain parchment writing, then produced by the officer of the Court, was the same writ delivered on the 3rd of May 1849 to the defendant. The attested copy of the writ of *fiери facias* was read to the jury, and the return, which was as follows:—"By virtue of the within writ to me directed, I have taken goods and chattels of the within named defendant, to wit, &c., of the value of £30 sterling, which goods and chattels remain in my hands unsold for want of buyers, therefore I cannot have that money, &c.; and I further certify that the within named defendant has not any other or more

Action against a Sheriff for a false return to a writ of *fi. fa.*—*Held*, the Sheriff not estopped from showing the writ to be unsealed, from having acted under said writ and returned goods on hands for want of buyers.

Held also, that the seal was essential.

E. T. 1851. "goods or chattels in my bailiwick. So answers Anthony Ormsby, Exchequer.
"Sheriff." The return was made on the 7th of June 1849, and
GALLOGLY v. ORMSBY. filed on the 9th of June 1849. It was admitted that on the 2nd of
May 1849 one William Kearney had been appointed, and succeeded
said Peter Bourke, as Sub-sheriff of said county. Evidence was also
given that at the time of the delivery of the writ and before the
return thereof there were divers goods and chattels to a large
amount belonging to the said Peter Bourke, within the bailiwick of
the defendant, and to the knowledge of the defendant, in addition to
those in the said return mentioned.

On the part of the defendant it was proved by an officer of the Court that all writs and executions issued from the said Court are issued from, and sealed in, the Writs Appearance and Seal Office; that no writ is ever sealed in said office until it is first entered in a book, kept in said office for that purpose, and that said entry is made in reference to the execution sealed, and not to the execution issued; that according to the practice of the said Court all executions are entered in said book, and that there was no entry in said book of any writ purporting to be issued at the suit of Thomas Gallogly against Peter Bourke. The original writ was then produced from the proper office, to which it had been returned, and it appeared that the said writ was not sealed with the seal of the Court of Exchequer, and that it never had been sealed, and had never passed through the Seal Office; that there was no mode of ascertaining the date of the issuing of the execution except by the date of the sealing of such writ, on which occasion the date is marked on all writs of execution; that there was no memorandum of such date on the said writ; that it was the duty of the plaintiff's attorney first to prepare the writ and have it signed, and then sealed; that it was the duty of whoever entered the writ to seal it; that there was no entry of said writ at all; that the sealing of a writ was the stamping thereof with the seal of the Court; that there was an entry of the return of the said writ on the 7th of June 1849, and of its being filed on the 9th of June 1849. The defendant then proposed to read the said original writ in evidence for the purpose of showing that it was not sealed, but the evidence was rejected as inadmissible. The defend-

ant also produced some evidence as to the goods and chattels alleged to have been in the possession of Peter Bourke within the bailiwick of the defendant before the return of the said writ, and gave in evidence a notice of the 15th of August 1849, served on the plaintiff's attorney, in the cause of *Gallogly v. Bourke*, by the defendant, calling on him to issue and deliver on behalf of the plaintiff a *venditioni exponas*, as he had returned goods on hands for want of buyers, which goods he considered that he could not now sell without that writ, the original writ being out of return.

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The CHIEF BARON having charged the jury, the defendant excepted as follows:—

First exception.—That the original writ being then and there in Court, proved and identified, that same, and not the attested copy thereof, was the proper evidence to go to the jury on behalf of the plaintiff.

Second exception.—That the learned CHIEF BARON should have directed the jury that inasmuch as it would appear by said original writ, if received in evidence, that same was not under the seal of the Court, they should find a verdict for the defendant.

Third exception.—That the learned CHIEF BARON should have received in evidence on behalf of the defendant the said original writ in order to show it was not under the seal of the Court.

Fourth exception.—That his Lordship should have directed the jury that upon the evidence given for the plaintiff and for the defendant respecting the said writ, whereof a copy was given in evidence on behalf of the plaintiff, that said alleged writ was void in law, and that same could not be the foundation of an action for a false return against the Sheriff.

Fifth exception.—That his Lordship should have directed the jury that if they believed the evidence for the defendant as to said alleged writ, whereof a copy was read in evidence for the plaintiff, they should find for the defendant.

Sixth exception.—That his Lordship ought to have held that the several matters aforesaid were an absolute bar to the action, or if not to the entire action, to the right of the plaintiff to recover a

E. T. 1851. *larger amount than was indorsed on the back of the said alleged writ, or the value of the goods indorsed thereon.*
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The plaintiff also excepted:—

First.—That no evidence should have been received on the part of the defendant touching the state or condition of the said original writ, or that the same was not under the seal of the Court.

Second exception.—That the Sheriff was estopped by his return from disputing the validity of the writ.

O'Donnell (with him *Fitzgibbon*), in support of the defendant's exceptions.

The points to be argued are:—First, as to the seal, essential or non-essential; secondly, as to the defendant being estopped by his return; thirdly, as to the original or copy of writ being proper evidence, both being in Court; fourthly, as to defendant's right to give original writ in evidence; fifthly, as to defendant's right to a direction on the evidence received.

The first point, whether the seal be or be not essential.—[PENNIFATHER, B. You need not trouble yourself on that point. If you can go into that question the case is with you; for the writ is bad].—Second point:—The defendant is not estopped by his return: *Hill v. The Proprietors of the Manchester and Salford Waterworks* (a); *Hayne and another v. Maltby* (b); 4 Com. Dig. tit. *Estoppel*, E; *Coke L.* p. 352, b; *Parsons v. Loyd* (c); *Nectar and Sharp, Executors, v. Gennett* (d); *Morgans v. Bridges* (e); *Brydges v. Walford* (f).

Third point:—The original being in Court, it is the proper evidence: 1 *Stark.* p. 229; *Moore v. The Corporation of Hastings* (g).

Fourth point:—The defendant entitled to give the original in evidence; for although under the statute the attested copy may be held to be proper evidence for the plaintiff, even though the original

(a) 2 B. & Ad. 544.

(b) 3 T. R. 438.

(c) 3 Wll. 341.

(d) 1 Cro. Elix. 466.

(e) 1 B. & Al. 647.

(f) 6 M. & Sel. 42.

(g) 10 State Trials, Appendix, p. 140, fol. ed.

be produced in Court, still there is no rule of law to deprive the defendant of his right to give the original in evidence as a substantive portion of his case.

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Fifth point:—The defendant was entitled to a direction on the evidence produced: 3 *Tayl. Ev.* pp. 753, 755; *Reid v. The Sheriff of Sussex* (a).

Tudor, in support of the verdict, argued that the defendant was estopped by the return, and by having acted under the writ, and referred to *Buller's N. P.* p. 66, and *Coke Lit.* p. 352, a, and cited *Pickard v. Sears and Barrett* (b); *Field v. Smith* (c); *Forster v. Cookson* (d); *Carlile v. Parkins* (e).

Cur. ad. vult.

It was not thought necessary to open the exceptions taken on the part of the plaintiff, as they were substantially involved in those of the defendant.

PENNEFATHER, B.

May 3.

This is an action against the High Sheriff of Mayo for not levying against his Under-sheriff more than £30, which sum only he had levied under the writ. The declaration alleges that by his default the plaintiff had lost the difference between that sum and the amount of the execution.

The plaintiff proved his case at the trial, and got a verdict for the damages which he sought. An objection was taken to the document lodged with the Sheriff, purporting to be an execution, but wanting the seal; it was delivered in that state by the attorney. The Sheriff acted on it to a certain extent, and returned it. It was argued that the return estopped the Sheriff from contending that this was not a genuine writ. The return was in these words:—
 “By virtue of the within writ to me directed I have taken the
 “goods and chattels of the within named defendant, to wit, &c.,

(a) 1 Camp. 469.

(b) 6 Ad. & El. 469.

(c) 2 M. & W. 388.

(d) 1 Q. B. R. 419.

(e) 3 Stark. 163.

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"of the value of £30, which goods and chattels remain on my hands unsold for want of buyers, therefore I cannot have that money before the Barons within mentioned as I am within commanded. And I further certify that the within named defendant has not any other or more goods or chattels in my bailiwick." It was contended that having made the return, in which he calls this document a writ, that he was estopped from saying that it was not a writ. And as further evidence of the Sheriff having acted under this supposed writ, it was proved that he called for a *venditioni exponas*, and contended that as this was acting under the supposed writ, that he was also by that circumstance estopped from disputing the genuineness of the writ. We are not called upon to give any opinion as to the levy of only £30; but we are called upon to say whether it was competent to the Sheriff to show under the circumstances that this parchment was not the writ of the Court. At the trial it was contended that the Sheriff could not show it was not a genuine writ; and the CHIEF BARON, in order to have the opinion of the Court on that question, and at the same time that damages might be assessed, held that the Sheriff could not question the genuineness of the writ. To that decision of the CHIEF BARON an exception has been taken. The jury found for the plaintiff. We think there was no estoppel here to prevent the Sheriff from showing that the supposed writ was not the writ of the Court. It is urged that the return was matter of record, and as such bound the Sheriff. But the return referred expressly to the writ; for it says, "I have levied under the within writ." That on the face of it calls attention to what was the within writ. The return cannot be read without reading the writ; and on referring to the writ it appears it was not the writ of the Court. If it was not the writ of the Court, the return cannot be said to be a matter of record, as it only becomes matter of record by being made on the back of a writ, which is matter of record. As therefore the return is not matter of record, there is no estoppel on the record.

It may, however, be said that the Sheriff acted on this writ; he did do so; but that only raises the question, whether the money levied is the money of the plaintiff or not? The wrong originated

with the plaintiff; he should have made out a proper instrument; as he did not do so, he must blame himself for the consequences, and not do the Sheriff the injustice of subjecting him to an action of trespass, by seeking to compel him to continue proceedings against the defendant that were illegal.

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The Sheriff, when he first proceeded under this document, may not have known that it was not a writ; the plaintiff cannot contradict that fact, when it was he who induced the Sheriff to act under it. If the Sheriff continued to seize the goods of defendant, he could not justify under that document; then to say that the Sheriff must expose himself to an action, is manifestly unjust.

LEFROY, B.

I concur with my Brother PENNEFATHER. The argument for the estoppel shuts out the merits; but if the estoppel were out of the way, and the merits could be gone into, it is plain that on the merits the plaintiff could make no case.

The plaintiff originated the whole mistake; he put into the Sheriff's hands a paper not a writ; and is it to be for one moment conceded that the party who has originated a mistake is to recover damages against the party whom he has misled? Here a Sheriff has a writ put into his hands; he does his duty, and the return being out, he calls on the plaintiff to issue a *venditioni exponas*, for then he would be safe, as there would be a good writ; but instead of doing this, an action is brought against the Sheriff for not proceeding further after he had discovered the defect.

The rule as to estoppel is this, that it binds the party to every thing he has directly said, but not to inferences from his statements. Here the Sheriff has said that by the within writ he has levied £30; that is no direct allegation that it is a writ; he refers to it, but does not affirm that it is a writ. Again, every thing the record avers is an estoppel to the party; but if there be no record, there is no estoppel; it is the same with respect to a deed; if no deed, no estoppel. The question may be raised whether there be a deed or not; so here whether there be a record or not.

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The plaintiff is not entitled to the judgment of the Court either on the merits or the law of the case.

ORDER:—That the said exceptions be allowed; and that a *venire de novo* do issue in this cause without further motion.

DANIEL QUINN

v.

MARY ANNE FITZGERALD, Executrix of HAVELOCK.

May 2, 9.

Action on promissory note by payee against executrix of maker. Declaration averred the note was payable at a particular place, excused presentment there as there were no assets. General verdict for plaintiff. *Held*, excuse insufficient for non-presentment.

Held also, that the *postea* might be amended by entering a verdict for the defendant on the special count, and for the plaintiff on the money counts.

THIS action was brought for the recovery of the amount of a promissory note by payee against executrix of maker.

The declaration contained a count on the note, and the money counts. The special count averred presentment, but no such presentment had in fact been made. The plaintiff at the trial proved by the Manager of the Provincial Bank that there were not at the time the note became due any funds there available for the payment of the note, and that if presented he would not have paid it. The plaintiff then, by leave of the Judge, amended the declaration by averring want of assets as an excuse for non-presentment; and there being evidence of the advance of the money, for which the note was given, Counsel for the plaintiff insisted at the trial that the case should be left to the jury as well on the money counts as on the special one, to which the Judge acceded. The jury found a general verdict for £40, the amount of the note, and the interest. The defendant then applied for and obtained, on the 24th of April 1851, a conditional order to arrest the judgment, or for a *venire de novo*, or for a new trial, as verdict against law and evidence, and for misdirection, and as the amendment did not show any legal excuse for non-presentment of the note.

The Judge in his report stated the foregoing facts, and added that he was surprised at the verdict. E. T. 1851.
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The note appeared to have been drawn and dated; and after the date, and interlined between it and the signature, were the words, "payable at the Provincial Bank, Ennis," which words were proved to have been there before the note was signed.

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Lane (with whom was *Brereton*) now showed cause.

The note was not a note payable at a particular place: *Price v. Mitchell* (a); *Bickerdike v. Bollman* (b); *Masters v. Baretto* (c). Assuming the note to have been made payable at a particular place, the want of assets at the Bank available for the payment of it is a sufficient excuse for non-presentment: *Rogers v. Stephens* (d); *Terry v. Parker* (e); *Carter v. Flower* (f).

The Court has jurisdiction to enter the verdict on the common counts on a motion in arrest of judgment: *Goodtitle d. Wright v. Otway* (g); *Mellish v. Richardson* (h).

Fitzgerald, with Sir C. O'Loughlen, in support of the conditional order.

No assets is not a sufficient cause for non-presentment: *Sands v. Clarke* (i). Where a note is made payable at a particular place as here, it must be presented: *Bowes v. Howe* (k); *Price v. Mitchell*; *Saunderson v. Bowes* (l). The note has been declared on by the plaintiff as a note payable at a particular place; it must now be assumed to be so.

Where there is a good count and a bad count, and a general verdict, the *postea* cannot be amended by entering a verdict on the good count: *Bmpson v. Griffin* (m); *Executor Eddows v. Hopkins* (n).

(a) 4 Camp. 200.

(b) 1 T. R. 405.

(c) 19 Law Jour. 50.

(d) 2 T. R. 713.

(e) 6 Ad. & El. 502.

(f) 16 M. & W. 743.

(g) 8 East, 357.

(h) 7 B. & C. 819.

(i) 19 Law Jour. 84, C. P.

(k) 16 East, 112.

(l) 14 East, 500.

(m) 3 P. & D. 160.

(n) 1 Doug. R. 376.

E. T. 1851. *Brereton*, in reply.

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Assuming the first count to be bad, evidence having been received that entitled the plaintiff to recover on the other counts, a verdict may be entered for him on those counts: *Gould v. Coombs* (a); *Moore v. Tuckwell* (b). If the note be not payable at a particular place, the averment in the declaration is immaterial, and the plaintiff not bound by it: *Davis v. O'Hare* (c).

PENNEFATHER, B.

This case involves the consideration of matters partly of form and partly of substance, which are important, and in some respects novel. We must assume, for the purposes of our decision, that the first count is bad; for it states a note payable at a particular place, and as matter of excuse, for not presenting it at that place, it is stated that there were no assets of the maker at the Bank when the note became due, and no injury sustained by the non-presentment. We are of opinion that the matter alleged is not a legal excuse, even though there were no assets at the Bank for the payment of the note, still the banker might have paid it on the credit of the customer; but it appears in point of fact there was a balance at the Bank, as proved by the banker, though not applicable to the payment of the bill, therefore if the note be payable at a particular place, which we do not decide, but which we must assume, as it is so stated in the declaration, the excuse alleged is quite insufficient. That being the case, and a general verdict being taken for the plaintiff, the defendant has moved the Court to arrest the judgment, and at the same time for a new trial. If the motion were merely to arrest the judgment, and no cross motion on the part of the plaintiff to enter or let the verdict stand on the money counts, we should have arrested the judgment, and could have done nothing else; but the defendant having moved to set aside the verdict, as well as in arrest of judgment, has enabled and called upon the Court to procure the Judge's report, and has placed the case in the same position as if the plaintiff had served a cross notice to amend the *postea* by letting

(a) 1 C. B. R. 543.

(b) 1 C. B. R. 607.

(c) 5 Ir. Law Rep. 337.

the verdict stand on the money counts. We think therefore that upon the authority of the late cases we have jurisdiction, if it be a proper case for its exercise, to amend the *postea* by entering a verdict for the plaintiff on the money counts, and for the defendant on the special count. The case then comes to this, is this a case in which the Court ought to exercise that power?

If it were a case in which we could not tell but that some damages were given by the jury on the bad count, it would be against the authorities, as it would be unjust to take that verdict and put it upon good counts, which the jury may not have considered in finding their verdict. Now, examining the case by that principle, let us see whether we can make this alteration without any hazard of doing injustice, or of giving ground for it to be said that we have transferred the verdict to counts on which the jury did not find it. It is quite clear that the jury did consider the first count, for they have found not only the amount of the principal sum, but also of the interest, which they could only have done on that event; it is therefore plain that they considered the note, and found their verdict on the note; but if the note were equally evidence on the money counts, and if by the verdict they have given credit to the case made, may not the jury have found their verdict not only on the first count, but also on the general demand for money lent, there being parol evidence that money had been lent? and if that be so, would it not be going against the principle of the cases mentioned, or rather going out of those cases, to say that the verdict did not stand on the money counts, and that the *postea* could not be amended by entering the verdict for the plaintiff on the money counts, and for the defendant on the special count? It therefore appears to us that if the plaintiff consent to pay the interest, and reduce the damage, by the amount of the interest, the verdict should be entered by the defendant on the first count, and for the plaintiff on the other counts, for the sum of £40. We have been very much pressed by the Counsel for the defendant that, as the Judge expressed surprise at the verdict, that we should not therefore exercise our discretion by making the order asked; but really it is not a matter of discretion, it is a matter of right, and we should not

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 GERALD. withhold the order for amendment, because the verdict may have been unsatisfactory to the Judge. The case was left properly to the jury, and they are the constitutional judges of the matter, and we must assume their finding right. The evidence too, as reported to us, appears to support the verdict. If we have a discretion therefore, we are bound to exercise it by not sending this case for a new trial.

In a case of so much doubt and novelty we think there should not be any costs.

LEFROY, B.

This case has been so fully entered upon by my Brother PENNEFATHER, that I shall make but this observation:—that it appears to me that the plaintiff only now seeks to have done what, if he had asked at the trial, and consented to forego the interest, would have been then done for him; that is, to enter the verdict on the general counts. I think therefore we may safely do it, and in conformity with the principle of the cases cited.

ORDER:—That the cause shown be allowed, without costs, and conditional order discharged, the plaintiff consenting to forego interest on the promissory note alluded to in the finding of the jury, and to reduce the verdict to the sum of £40, and that the *postea* be amended, in conformity with the notes of the learned Judge, by entering a verdict for the plaintiff on the money counts of the plaintiff's declaration for the sum of £40, and six pence costs; and a verdict for the defendant on the first count of said declaration, and judgment forthwith entered for the plaintiff on the said *postea* without further motion; the defendant's costs under the said count to be deducted from the plaintiff's general costs of this cause. No costs of this motion.

T. T. 1851.
Queen's Bench

BRIDGET HARTE, Administratrix of the
 Rev. HENRY HARTE, . . . *Petitioner* ;
 The Rev. JAMES BYRNE . . . *Respondent*.

(*Queen's Bench*).

June 13.

PROHIBITION.—In this case a conditional rule had been obtained on behalf of the respondent, directing that a writ of prohibition should issue to the Bishop of Derry, prohibiting him issuing a sequestration against the respondent, upon the ground that the approbation and consent of the Bishop of Derry, on the memorials of the Rev. H. Harte (deceased), praying that the site of the glebe might be changed, was not given by the Bishop under his hand and seal, and that no sufficient authority to change said site was given; and upon the further ground, that the certificate bearing date the 26th of July 1850 was not warranted by the statute.

It appeared from the affidavit of the respondent (on which this conditional order was obtained) that he had been inducted into the rectory of Cappagh, in the diocese of Derry, on the 30th of October 1849. That at the time of his induction no certificate creating a building charge had been granted under the hand and seal of the Bishop of the diocese, and no demand of payment of any sum of money in respect of such certificate was made by the personal representative of his predecessor until the 9th of November 1850, his predecessor having died on the 16th of April 1849. That the petitioner, as administratrix of his predecessor, did present to the Bishop of Derry a petition on the 9th of November 1850, stating that the Rev. Henry Harte did, during the period of his incumbency, with the consent of the Bishop, expend in building on a new site a glebe-house and offices a sum of £4171, which expenditure was duly certified by the Commissioners for that purpose appointed. That the Rev. H. Harte afterwards died intestate, and that by a

An order for a prohibition will not be granted, unless there be a suggestion or affidavit filed as ground for the order.

The certificate directed by 10 W. 3, c. 6, s. 1, entitling an ecclesiastical person to recover from his successor a portion of the sum expended in the improvement of a glebe, altho' granted after the death of the party making the improvements, is valid.

T. T. 1851. certificate, duly executed by the Bishop on the 26th of July 1850,
Queen's Bench that expenditure was certified, and also that the income of the benefice
HARTE amounted to £1360. That the petitioner, as personal representative
v. of the Rev. Henry Harte, had become entitled to be repaid the sum
BYRNE. of £2721 by the respondent by certain instalments, none of which
had been paid, and prayed a sequestration of a moiety of the rents
of the benefice.

The affidavit further stated that a conditional order for a sequestration, in pursuance of the prayer of this petition, was accordingly granted. That the respondent, as cause against this conditional order, alleged that before the granting of the Bishop's certificate applications had been made to him for money, alleged to be due under a certificate granted by the Rev. Robert Hume, a commissary appointed to act in the absence of the Bishop, and that he had not been applied to for payment of any sum of money upon any certificate under the hand and seal of the Bishop. That he had been advised that the certificate of the Rev. Robert Hume was invalid. That he protested against the sequestration issuing, on the ground that the certificate granted by the Bishop after a year had elapsed from the death of his predecessor, and long subsequent to the induction of the respondent into the living, was invalid ; and he also objected on the ground that the site of the glebe had been altered without the consent and approbation of the Bishop, under his hand and seal, being first obtained ; but notwithstanding such protest the sequestration was granted.

The affidavit of the petitioner, after stating the necessity for the building of a new glebe and the certificate granted by the Bishop for that purpose, and the execution of the work, stated that a certificate was accordingly granted to the Rev. Henry Harte by the Rev. Robert Hume, by virtue of a commission directed to him by the Bishop, empowering him to act on his behalf during his absence from his diocese ; that he thereby certified the amount of the sums expended by the Rev. Henry Harte, and did declare his approbation of same, and that same was truly expended, and that the buildings, &c., were a proper residence for the rector and his successors, and that the Rev. H. Harte, his executors, administrators or assigns, might recover from his successor the sum therein

stated. That this certificate was duly registered pursuant to the statutes in that behalf, and that such certificate was deemed valid by the Bishop and the Rev. Robert Hume; that on the death of the Rev. H. Harte she was advised to procure from the Bishop a certificate signed by himself, which she accordingly procured; that this certificate varied in no essential particular from the former one, save that it was under the hand and seal of the Bishop himself, and she submitted that this certificate was conclusive as to all preliminary matters required by the statute in that behalf.

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In Easter Term a conditional order for a prohibition similar to the present was obtained, and on application to make it absolute—

R. W. Greene, for the petitioner, objected to its being made absolute, on the ground that there was no suggestion or affidavit to ground the conditional order.

Per Curiam.

The practice is to suggest the legal proposition either formally or by affidavit stating it. It is preliminary to entertaining the motion.

Allow the cause, with costs.

The above affidavits having been filed—

Greene (with him *Radcliffe* and *C. Andrews*) showed cause against the conditional order.

This Court has no power to interfere by prohibition in this case. It has no right to interfere by prohibition with the execution of a judgment of an Inferior Court, unless it be satisfied that that Inferior Court had no jurisdiction; that in fact the pronouncing judgment was outside its jurisdiction; but here the Bishop clearly had jurisdiction, and his judgment is final. The 10 *W.* 3, c. 6, s. 1,* gives the jurisdiction, and a certificate granted under it, after

* 10 *W.* 3, c. 6, s. 1, enacts, "That every Archbishop, Bishop or other ecclesiastical person whatsoever, that shall hereafter at any time make, build, erect, add to or repair any house, out-house, &c., or any other necessary improvement on his

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registry in the diocese, is conclusive evidence of the facts stated therein: *Graves v. Murray (a)*. That authority shows that a certificate granted by the Bishop after registry in the diocese is conclusive evidence of the facts stated in it. It is impossible that this Court can issue a prohibition unless it be shown the Bishop had no jurisdiction. To hold he had no jurisdiction, would frustrate the intention of the Legislature.

Assuming then that the Bishop had jurisdiction, the question is, had he jurisdiction to grant the certificate after the death of the Rev. H. Harte? A certificate is an attestation of a certain authority as to certain facts; it is a mere adjudication or testimony of those facts. The Bishop having the power to attest those facts, there is nothing in the Acts to limit the time for the granting of the certificate. All the requisites in the Act had been complied with before the death of the Rev. H. Harte, and his death cannot make them irregular. The statute of *W. 3* states no time within which the certificate should be granted. The *12 G. 1, c. 10*, by the seventh section, enacts that every ecclesiastical person intending to build or make improvements shall give to the person who is to grant him the

(a) H. & Jo. 165.

demesne, glebe, &c., that shall be certified in the manner hereafter mentioned in like cases to be fit and convenient for the residence and habitation of him and his successors, which from thenceforth shall be deemed and taken to be part of the demesne, glebe, &c., shall have and receive from his next and immediate successor, his executors or administrators respectively, two-thirds of the sum or sums really and truly expended and laid out in such buildings, &c., which sum or sums shall be finally settled and ascertained by certificate under the hand and seal of the Chief Governor or Governors for the time being, in the case of an Archbishop; and of the Archbishop of the province in the case of a Bishop, and by like certificate of the Bishop of the respective diocese in all other cases; and such successor as aforesaid having paid the two-thirds of the sum or sums certified as aforesaid, shall and may receive one moiety thereof, that is, one-third of his first disbursement from his next successor, which said sums shall be paid in all cases of removal or translation, by four equal half-yearly payments, to be accounted from such removal or translation; and in case of death, by two equal half-yearly payments, to be accounted from the day of such death, and shall and may be recovered by the party who ought to receive the same, his executors or administrators, either by distress, &c., sequestration, &c., or action, &c., at the election of the party who sues for same."

certificate a writing subscribed with his hand in the presence of two witnesses, stating all particulars of the building intended, a copy of which writing shall be returned to the party who is to grant the certificate; and if the building, or so much of same as shall be built or made before the death or removal of the incumbent undertaking the same, shall be found agreeable to the writing, and its value reported by the Commissioners, then the certificate shall be granted. In the case there referred to of part performance the certificate could not be given until after the death of the party. Before the Bishop grants the certificate he is bound to ascertain the facts, which inquiry may occupy some time; and yet it is contended if the party die during that period, the right is gone. If every thing be regularly done he has an inchoate right to this sum.

Suppose the party proved his expenditure on one day, and died on the following day, would it not be competent for the Bishop to issue a certificate on a regular commission, and all the subsequent proceedings? The Act, not the certificate, imposes the charge; the certificate is not the foundation of the right, it is only evidence of the extent of it. Then comes the 9 *G.* 2, c. 13, amending the former Acts; that, by the 5th section, authorises, when the former certificates are inaccurate, the granting of additional certificates, which are to be final. Then comes the 13 & 14 *G.* 3, c. 27. The 6th section shows that there is no foundation for the argument that the certificate is invalid after death. It provides that Bishops and other ecclesiastical persons improving glebes are not to be entitled to a certificate for two years' income, unless the building be completed, but are only to receive three-fourths for so much of the same as shall be expended before the death of the incumbent, in like manner as directed by 12 *G.* 1; and it creates a new species of charge, and refers to the 12 *G.* 1 as applicable to it, which it could not have done if that very circumstance, giving the right, be a nullity. Then the 31 *G.* 3, c. 19, s. 2, provides that such sum as shall be necessary to complete the building shall be deducted from the Bishop, who would be entitled to receive same in case he had finished it; and that the executors of every person who shall die before he shall have finished such buildings is to obtain a certificate.

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Brewster and Napier (with them *H. Smythe*), contra.

We contend the Bishop had no jurisdiction to entertain this question at all. He had no power to grant this certificate after the death of the incumbent. The certificate is founded on, and must contain, the amount of the income of the benefice ; that is mandatory in the statute, for the amount of the sum certified is to be regulated by the amount of the income. This is a question of great importance ; for if the respondent be not legally liable, he cannot recover over his proportion from his successor.—[CRAMPTON, J. From *Brown's Ec. Law*, p. 147, it would appear to be that writer's opinion that such a certificate can be granted.]—The case before the Court does not come within any enactment, providing it shall be granted after the death of the party ; the enactments are inconsistent with such a certificate. The 12 G. 1, c. 10, s. 7, alone gave the right to the certificate ; and the 8th section provides that no ecclesiastical person shall have a certificate until he execute a new lease. Suppose a certificate not granted for three or four years, and the party alleged to be liable dies, how is the money to be raised ?—[MOORE, J. A party by lying by may place himself in such a position as not to be entitled to any relief.]—However, the 8th section is imperative that no certificate shall be granted until a release be executed.—[MOORE, J. May we not presume that a release had been executed ?—CRAMPTON, J. The Bishop is bound to see that a release be executed ; there is nothing more said about it ; it is not to be registered, and we are not bound to presume the Bishop has not done his duty.]—We merely say it is a *casus omissus* in the Act.

Radcliffe replied.

BLACKBURN, C. J.

The Court have no difficulty in dealing with this case. The petitioner, the personal representative of the Rev. Henry Harte, proceeded to obtain a sequestration in the Diocesan Court of the Bishop of Derry for the purpose of levying a sum, ascertained by the certificate of the Bishop as the sum due to her as the personal representative of her husband, who died in 1849.

Henry Harte instituted the regular
 pairing the glebe-house. A com-
 thereto, which certified that
 expended before the year
 the regular registered certi-
 and seal of the Bishop, one was
 commissary, sealed with the diocesan
 ent to sustain the right claimed by the
 that insufficiency was not discovered until
 the question now is, whether or not a certificate,
 year 1850, more than twelve months after his death,
 twelve from the appointment of his successor, be a
 on this ground, that after the death of the Rev. Henry
 the Bishop had no right to sign or grant this certificate at
 that period? In order to decide that, it is necessary to see what
 gave to this document validity. It was the act of the Bishop, for
 doing which no Act of Parliament has prescribed any time or form,
 and it was his duty to do it—it was a judicial act; the document
 itself is of a general character, which was obligatory on the Bishop to
 execute, because it regulated the rights of the incumbent as against
 succeeding incumbents; and yet it is said all this is to be abandoned
 because the certificate was not executed within a specified time. We
 are not called on to say whether or not the Bishop was authorised
 to do it after the Rev. H. Harte's death, or whether or not there
 be any limit prescribed to do it, because the certificate was a judi-
 cial act, invested with that character by the registry. Some of the
 statutes save certain rights, which otherwise would determine by
 death; but the provisions of this statute impose no limitation; and
 to argue for a limitation so perfectly arbitrary and inconsistent
 with justice, which would be subversive of the plain rights of the
 incumbents, is but calling on the Court to do that which would
 be manifest injustice.

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The foundation of this application must be that the Bishop had

* See, however, 13 & 14 Vic. c. 73, s. 4, which makes such certificate sufficient.

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no jurisdiction to grant the certificate. I am of the same opinion as my LORD CHIEF JUSTICE. That the Bishop had jurisdiction in this case, there is no doubt. The Bishop has a duty to perform; and if he refuse to exercise that judicial power so vested in him in a proper case, this Court would compel him by *mandamus* to do so. He has exercised his jurisdiction, and why should the Court interfere with what he has done by granting a prohibition? Is his jurisdiction then taken away by the death of the incumbent? Although the case is not provided for in express words, it is manifestly within the meaning of the Legislature, and it is admitted that this was nothing less than the case of an executor applying in a proper case; it is therefore admitted that by the mere death the Bishop did not lose the jurisdiction. Has he then lost it by lapse of years during which no valid certificate was granted? It is impossible to say he has so lost that jurisdiction. The certificate first granted was a nullity, but it was not so considered by the parties; and that accounts for their lying by so long. There was no fraud in the transaction. That is the reasonable construction to be put on the Act, and the same which was put upon it from the earliest authorities.

But then it is said it is a condition precedent to the granting of the certificate that there should be a release executed by the incumbent. Would it be reasonable to suppose that the Bishop had not done his duty and obtained the release, if the statute directed that the Bishop should have obtained it? and should not the release of the executor or administrator be as valid as a release of the party himself? Upon the authority of *Graves v. Murray* we would have no right to go behind the certificate. The only difficulty raised was with respect to the question of time. It has been argued that the Bishop must grant it in a reasonable period of time; but then we must recollect that the Bishop is the Judge to decide as to granting or refusing the certificate; and are we to assume that the Bishop by this judicial act will do what he ought not to do?

PERRIN, J., and MOORE, J., concurred.

Allow the cause, with costs.

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Queen's Bench

REILLY and others v. GUINNESS.

July 7.

HICKEY, on the part of the defendant, moved to set aside the declaration filed in this cause, on the ground of irregularity, inasmuch as it contained a count for interest, and was signed by Counsel. The action is one for work and labour, and for money had and received, the common money counts, and the addition of the count for interest is but an evasion of the Practice and Process Act.. That statute, 13 Vic. c. 18, s. 18, says the Judges shall settle upon a form of declaration to be used in all actions at law to be brought on a bill of exchange, promissory note, money had or received, or for goods sold and delivered, which form *and no other* (unless the Court shall make an order to the contrary) shall be used and adopted in such and the like actions. Now in the form settled by the Judges there is no count for interest inserted, and it is unnecessary, because under 3 & 4 Vic. c. 105, s. 53, interest may be recovered in damages or under a notice; and if the plaintiff wished to depart from the settled form of declaration, application should have been made to the Court.

A declaration for work and labour by two surviving contractors, on a cause of action vested in three, contained a count for interest, and was signed by Counsel.

Held, that such declaration would not be set aside as irregular.

Fitzgibbon, contra.

This motion is misconceived; for if the count should not have been inserted, the application should have been to strike out the superfluous matter: *Townsend v. Gurney* (a). But we could not recover interest unless this count were inserted. It is an action against two defendants on a joint contract with them, and a third person, now deceased.

CRAMPTON, J.

We cannot grant this motion. The difficulty in all these cases arises from the dogmatical form of the enactment, which obliged

(a) 1 Cr. M. & Ros. 590.

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the Judges to follow its peremptory terms. If the count for interest stood alone, on an affidavit being made that such count was not necessary, or that it was inserted to evade the statute, I could feel no difficulty in striking it out of the declaration. But this is not the case of A and B contracting simply with each other ; but it is the case of a special devolution of a right of action in three persons on two survivors. Without prejudice to either party we say—

No rule—no costs.

PERRIN, J., concurred.*

* The CHIEF JUSTICE and Mr. JUSTICE MOORE were absent.

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Common Pleas.

In re MAHON'S ESTATE.

(*Common Pleas.*)

April 24, 25.
 June 17.

THE following case was sent by the Commissioners for the Sale of Incumbered Estates in Ireland for the opinion of the Court of Common Pleas :—

Joseph Mahon being seised *pur autre vie*, with a covenant for perpetual renewal, of a moiety of the lands of Mullaghderg, in the county of Donegal, the other moiety thereof belonging to John Mahon the second, and Jane Mahon, hereinafter mentioned, made his will on the 14th of January, A.D. 1803, in the words following :—“ In the name of God, I Joseph Mahon, of Mullaghderg, in “ the parish of Templecrow, and county of Donegal, do make my last “ will and testament as follows, hereby revoking any will or wills

A testator, seised *pur autre vie* of a moiety of the lands of M., with a covenant for perpetual renewal, devised “ one third undivided part of his freehold in the said M.,” together with other lands “ to his son George for ever, with power to him to bequeath the same to

his lawful heirs male or female in such proportions as he should think proper, thereby however binding and obliging him to leave one-half of his said lands to his present children by his late wife, or to the survivors or survivor of them, in such divisions or shares as he should please.” He then devised another one-third to his son Joseph in similar terms, and the remaining one third to his wife Elizabeth during her life; and if his son John should marry a Protestant, he bequeathed to him the said one-third part of the above lands after the death of his mother for ever, with full power for him to give or leave the same to his lawful heirs male or female in such shares as he should think proper; and if any one or more of his said three sons should die without leaving lawful issue, his or their third parts should go to the surviving brothers or brother, and their lawful issue as above; and if all his said three sons should die without lawful issue, that all the said lands should go to his daughter J. F. and her issue for ever. The will contained a bequest of twelve guineas to J. F., to be paid within a year after her mother's death equally by her three brothers; and also the following clause :—“ As my son George or Joseph might possibly, by the influence of a second wife, make a long lease at a low rent to or in trust for the children of such second wife, of that half of the land which I intend should be a provision for their present children by their first wife, my will is, that one-half of the land shall go to their present respective children, the survivors and survivor of them, free, clear and discharged of all debts, incumbrances or leases above seven years from their deaths.”

Held, that George Mahon took an estate for life in one-sixth of the lands of M., with remainder to his children living at the date of the will, for their lives, subject to a power of distribution by George, with remainder to George in *quasi* tail, and that he took an immediate estate in *quasi* tail in another one-third. That Elizabeth, the testator's widow, took an estate for life in another one-third, with remainder to the testator's son John in *quasi* tail, with remainder to the testator's sons George and Joseph as tenants in common in *quasi* tail, with cross remainders between them, with remainder to J. F. in *quasi* tail, and that Joseph took an estate in *quasi* tail in the remaining one-third.

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"made, or supposed to be made, by me :—I leave my son George
"Mahon one third undivided part of my freehold in said Mullagh-
"derg, and also my freehold in the parish of Tullaghbegley, and
"also of my holding in Mullaghduff, of which last a lease for
"lives is promised by the agent of Lord Conyngham, for ever,
"with power to him to bequeath the same to his lawful heirs male
"or female in such proportions as he shall think proper, hereby
"however binding and obliging him to leave one-half of the said
"lands to his present children by his late wife, or to the survivors
"or survivor of them in such divisions or shares as he shall please;
"and with the other half he may make provisions for a future
"wife and her issue in such portions as he shall think proper.
"I leave to my son Joseph Mahon another one third undivided
"part of the above lands, and to his heirs for ever, male or female,
"with power to him to divide the same among them in such shares
"as he shall think proper, binding him as above in the case of the
"death of his present wife, and that if he should marry again to
"leave one-half of his land to the children of his present wife in
"such divisions as he pleases. And to my wife Elizabeth Mahon I
"leave the remaining third undivided part of the above lands during
"her life, in full hope and trust that she and my son John will live
"together ; and if he my said son John shall marry a woman born
"and bred a Protestant, and of reputable parents, to him I leave and
"bequeath the said third part of the lands after the death of his
"mother, for ever, with full power to him to give or leave the same
"to his lawful heirs male or female in such shares as he shall think
"proper. And my will and meaning further is, that if any one or
"more of my said three sons shall die without leaving lawful issue,
"his or their third parts shall go to the surviving brothers or brother
"and their lawful issue as above ; and if all my said three sons shall
"die without leaving lawful issue, that all the said lands shall go to
"my daughter Jane Finlay and her issue for ever, as my principal
"debt was lately contracted to enable me to purchase half of my
"present property in Mullaghderg, formerly possessed by George
"Mahon, now in America, and as I leave and bequeath all my land
"in equal parts to my three sons ; so I devise and order that the above

"and all my other just debts shall be paid equally from these re-
 "spective properties, although I have long since paid the portion
 "promised to my daughter Jane Finlay on her marriage, and that
 "she and her family have been a very expensive and heavy burthen
 "on the labour and industry of myself and my sons almost ever since
 "her marriage; and although I have much reason to be dissatisfied
 "with the conduct of her husband's brother, neglecting her and her
 "children, and for his inattention and neglect, and contempt to me,
 "by refusing to contribute such assistance as he could and might and
 "ought to have afforded towards the support of his family, yet I leave
 "her twelve guineas, to be paid within a year after her mother's
 "death equally by her three brothers, four guineas each; to my wife
 "I leave my dwelling-house and such offices as I shall occupy at
 "the time of my death, during her life, and at her death I leave the
 "said dwelling-house to my son George; the house built for my son
 "George may then go to my son Joseph, and my stable to my son
 "John; and I desire that his brothers may assist him in making
 "such addition to it as he shall think necessary, not exceeding the
 "value of ten pounds sterling, that sum of ten pounds sterling to be
 "paid to him equally by his two brothers, five pounds sterling each,
 "in lieu of such assistance; all other out or office houses I order to
 "be equally divided between my said three sons after their mother's
 "death; all my other property of every description, cows, horses,
 "sheep, crop, household furniture, and all moveable goods and chattels
 "of all kinds whatsoever, I leave to my wife during her life, and in
 "her disposal at or before her death, with full power to her to give
 "away, dispose of or bequeath the same by will or otherwise in such
 "manner or shares as she may think proper, to her sons or daughters,
 "or to any other persons whom she may think most deserving of her
 "favour, for their attention or care or kindness to her in her widow-
 "hood, and I do also nominate and appoint my said wife sole exe-
 "cutrix of this my last will and testament. As my son George or
 "Joseph might possibly, by the influence of a second wife, make a
 "long lease at a low rent to or in trust for the children of such
 "second wife, of that half of their land which I mean and intend and
 "wish should be a provision for their present children by their first

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"wife, my will and order is that one full half of these lands shall go
 "to the present repective children and the survivors or survivor
 "of them, free, clear and discharged of all debts, incumbrances or
 "leases above seven years from these dates; nor do I injure my son
 "George or Joseph by this, as they can now by my late purchase
 "make good provision for the support of second wives and their issue,
 "as they were entitled to from my other property on their first
 "marriage; but by the above restriction I do not mean to include
 "any child or children which my son Joseph may have by his
 "present wife."

This will was dated the 14th of January 1803, and duly executed by the testator in the presence of three witnesses. The testator died prior to 1804, leaving him surviving the three sons named in his said will, George, the eldest, and Joseph and John. George never married a second time, but by his first wife he had a son named John Mahon. John Mahon, the son of George, and all the other children of George, died in the lifetime of the latter without issue, except John, who left an only son, Robert Irwin Mahon, still living. John Mahon, the son of the testator, died in 1829 intestate, unmarried and without issue. George Mahon died in 1830, leaving his said grandson Robert Irwin Mahon and his brother Joseph him surviving, and without executing any appointment of the lands. Elizabeth, widow of the testator, died in 1831, leaving her surviving the said Joseph Mahon, who since died, leaving several children, and among them George Mahon, one of the alleged owners. A renewal was made in 1817 to George, Joseph and John (the three sons of the testator), John Mahon the second, and Jane Mahon. The questions submitted for the opinion of the Court were:—First, what estate George, the son of the testator, took under the said will in the events aforesaid in the lands of Mullaghderg, and in what proportional part thereof? Secondly, whether the said second Robert Irwin Mahon took any and what estate in any and what proportional part of the said lands in the events?

J. E. Walsh (with whom was *C. H. Hemphill*), for the petitioner in Incumbered Estates Court.

We say that George Mahon took an absolute interest in his own

one-third; that is to say, that he originally took an estate either in tail or in fee in his own one-third, subject to an executory trust to appoint among his children living at his death; and he having died without leaving any such children, it became an absolute interest in him; and secondly, that he took a base fee in one-half of John's one-third—that is, that John originally took an estate tail in remainder, which was by the renewal converted into a base fee, and on his death, without issue, descended to Joseph Mahon and Robert Irwin Mahon, or he took no estate, and then there was an intestacy as to all beyond the widow's life, which descended to George, and from him to Robert Irwin Mahon.

It is plain that under the first devise to George he would take an estate in fee, and not an estate for life, with a power of appointment. The words "for ever" and "my freehold" which are equivalent to "my inheritance," would carry the fee: *Purefoy v. Rogers* (a). So likewise would the words "part of my freehold:" *Bebb v. Penoyre* (b); *Paris v. Miller* (c). The fee being once given, the words "with power to him to bequeath the same to his lawful heirs male or female" merely confer a power which George, under the previous devise, would necessarily have, and cannot cut down the estate previously given: *Doe d. Herbert v. Thomas* (d); *Simmons v. Simmons* (e). The word "heirs" cannot mean heirs apparent, because the power is one "to bequeath to his lawful heirs."

It will be urged that George took an estate for life, with power to appoint among his children; but if the words do not imply an estate in default of appointment, then the inheritance is undisposed of and descended to George; and if there be a gift by implication, it must be confined to the object capable of taking under an execution of the power: 1 *Jarman on Wills*, p. 486; 2 *Sugden on Powers*, p. 167; *Walsh v. Wallinger* (f); *Woodcock v. Rennick* (g); that is, children living at George's death, the power being plainly

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(a) 2 Saund. 33.

(c) 5 M. & S. 408.

(e) 8 Sim. 22.

(b) 11 East, 160.

(d) 3 A. & E. 123.

(f) 2 R. & M. 78.

(g) 4 Beav. 190.

T. T. 1851. *CommonPleas.* testamentary : *Doe d. Thorley v. Thorley* (a) ; *Paul v. Hewetson* (b) ; and the power could not be executed in favour of grandchildren : *Sugden on Powers*, p. 253 : and further, the estates implied in George's children could only be life estates. The question is suggested, in 1 *Jarman on Wills*, in the following terms :—"If the subject of the implied gift be real estate, it may "be a question (supposing the will to be regulated by the old law) "whether the implication confers an estate for life or fee? There "would be strong ground for contending the latter if the power "authorised the limitation of estates in fee;" and this view would seem to be sustained by the expressions of the Court in *Casterton v. Sutherland* (c). A power to appoint in "such shares as the devisee "of the power should think proper does not authorise an appointment in fee." In *Campbell v. Sandys* (d), where an estate was limited by marriage articles to John Campbell for life, and after his death to the use of the issue of the said John Campbell in *such shares and proportions* as he should by deed or will appoint, Lord Redesdale observes, that "this power was only to limit proportions, "and that only in the event of the existence of more children than "one;" and the same opinion may be deduced from the expressions of the Court in *Rex v. Stafford* (e). If our previous argument be well founded, the gift over on failure of issue cannot be used to cut down the estate which George took under the previous terms of the will. If the will contains a devise to George for life, with power to him to appoint by will to his children living at his death, and in default of appointment, to them for life, the limitation over could not be referential. The cases in which words importing a failure of issue have been held to be referential are cases in which there has been first limitation of a life estate, with remainder to the children of the first taken, and then a gift in default of issue ; if the previous limitations exhaust all the issue it would be nugatory to hold the words to be referential. Such are the cases of *Goodright d.*

(a) 10 East, 438.

(b) 2 M. & K. 434.

(c) 9 Ves. 445.

(d) 1 Sch. & Lef. 281.

(e) 7 East, 521.

Docking v. Dunham (a); *Ginger v. White* (b); *Blackborn v. Edgely* (c); *Mosse v. Lord Ormond* (d); *Tucker v. Baker* (e).

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In like manner the words are held not to be referential where any considerable number of the descendants of the first taken are omitted in the previous limitation, as in *Langely v. Baldwin* (f); *Attorney-General v. Sutton* (g); *Doe v. Gallini* (h). But these cases do not apply where the estate limited to the first taker is in fee, which is sought to be cut down by words of reference; nor where the children take only life estates: *Wright v. Leigh* (i). The bequest of twelve guineas, a pecuniary legacy, payable by the devisees, further indicates an intention to confer more than a life estate.

Secondly—With respect to the share of John. He either took an estate tail by implication expectant on his life estate, and on his death, without issue, his share descended to his two brothers or their issue, or there is no intestacy as to his portion; the residuary clause being only confined to the personalty, or at most giving the testator's widow only an estate for life, with a general power of appointment, which was not exercised.

J. Hamilton (with whom was *F. Fitzgerald*), for Robert Irwin Mahon.

We submit that George Mahon, the testator's son, took under the will of the testator either first—an estate for life in one-third, with remainder as to one moiety to his children living at the death of the testator, as George Mahon should appoint by will, and in default of appointment, to them in fee; and as to the other moiety, to his issue generally, living at his own decease, as he should appoint, and in default of appointment, to them in fee; or secondly, that George took an estate in fee, subject to a trust after his decease, as to one moiety for his children living at the death of the testator, as George Mahon should appoint by will, and in default of appointment, to

(a) Doug. 264.

(b) Willes, 318.

(c) 1 P. Wms. 600.

(d) 5 Mad. 99.

(e) 11 Ir. Eq. Rep. 104.

(f) 1 P. Wms. 749.

(g) Ibid, 754.

(h) 3 A. & E. 340.

(i) 15 Ves. 464.

T. T. 1851. *Common Pleas.* them in fee; and to the other moiety for his issue generally living at his own death, as he should appoint, and in default of appointment to them in fee. The will shows a clear intention on the part of the testator that the children of George Mahon should take some estate independent of any will on the part of George. This is shown by that passage of the will in which the testator says:—
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 “As my sons George or Joseph might possibly by the influence of a second wife make a long lease and at a low rent, to or in trust for the children of such second wife, of that half of their land which I mean and intend and wish should be a provision for their present children by their first wife; my will and order is, that one-half of their land shall go to their present respective children, and the survivor and survivors of them, free, clear and discharged from all debts, incumbrances or losses above seven years from their deaths.” If then there be a gift to the children, which can only be carried into effect by implying, first—a life estate in George, or secondly, a fee coupled with a trust, the Court will so construe the will as to effectuate that intention. The latter construction cannot be maintained, because if George took in fee, he could in this Court dispose of his interest, incumber it, or make a lease of it at his option.

Secondly—The words “heirs male and female,” as used by the testator, cannot import those words in their proper sense; but his meaning seems to have been—“it is my wish that my son George, in directing this among his children, whom I designate by the terms heirs male and female, should divide one moiety amongst all.” George Mahon could not divide his share amongst all his heirs, for *all* could not be “heirs” in the technical sense of the term. Neither could the issue of the second marriage be his heirs male, while issue male of the first were living. The rule that an estate, implied by a gift in default of the exercise of a power of appointment, must be restricted to the objects of that power, does not apply where there is a previously expressed gift to them: *Heron v. Stokes* (a). If an estate be given to a man and his heirs, and the will afterwards contains powers inconsistent with the possession of that estate, the

(a) 2 Dr. & W. 89.

Court will reduce the estate so as to make it correspond with the apparent intention of the testator.

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Thirdly—The words “survivors or survivor” refer to the death of the testator. The rule, that where there is a gift to a class, and they must be ascertained by reference to a particular period, the terms “survivors or survivor” are to be determined by reference to that, does not apply where the persons are specially designated. If an estate be given to three persons by name, the survivors or survivor, it is an estate in joint tenancy either in fee or for life, and the words would refer to the survivor at the death of the testator: *Doe v. Prigg* (a), and not to a survivorship at the death of George Mahon.

Fourthly—The children of George take the one-third limited to him absolutely. If there be a devise for the entire fee to the use of A for life, with power for him to dispose of the same among his three children, this would render it necessary for A to divide the fee; and if the testator then went on to give an estate to the children in words which would not be sufficient to give them the fee, the two clauses must be read together, and a gift in fee would be implied in favour of the children.

Fifthly—Assuming that the will exhibits a clear intention to give an estate for life to George, with remainder to his children in fee, the effect of the devise in default of payment would not be to give an estate tail to George. If lands be limited to A for life, remainder as to one moiety to B, and as to the other moiety to the issue of A, and in default of issue of A, over to C, it could not be contended that an estate tail would be implied in A, because there would be a manifest intention exhibited to exclude the issue from a portion of the lands. So here the issue of a second marriage could never take as heir of the issue of the first, and the case becomes identical with that put.

Sixthly—The words “heirs male and female” must be read “children.” The testator, in the passage already referred to, translates it by that word. The testator must have known that the children of George by a second marriage could never inherit

(a) B. & C. 231.

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as heirs of the children of the first marriage; yet, after a power to George Mahon to bequeath his one-third to heirs male or female, under which the issue of the first marriage only while living could have taken, and under which the issue of the second marriage never could inherit from them, he obliges his son George to leave one moiety to the issue of the first marriage. If the limitations be read as follows, it will be found that the whole will is consistent; a limitation to George for life, with remainder as to one moiety to the children of his first marriage, with remainder as to the other moiety to the issue of George generally. This would exhaust all issue, and then the words "default of issue" should be read "default of such issue."

The following cases were cited:—*Doe v. Lamny* (a); *Hockley v. Mawbey* (b); *Doe v. Goff* (c); *Roe v. Bacon* (d); *Doe v. Alcock* (e); *Right v. Creber* (f); *Harding v. Glyn* (g); *Brown v. Higgs* (h); *Sherratt v. Bentley* (i); *Lang v. Pugh* (k); *Crone v. O'Dell* (l); *Knight v. Selby* (m); *Moore v. Cleghorn* (n).

George Mahon was not represented.

Hemphill, in reply, cited the following authorities:—*Sunday's case* (o); *Forth v. Chapman* (p); *Doe v. Cooper* (q); *Pierson v. Vickers* (r); *Kenny v. Agar* (s); *Dansey v. Griffiths* (t); *Theluson v. Woodford* (u); *Seale v. Barter* (v); *Doe v. Goldsmith* (w);

(a) 2 Bar. 1100.

(b) 3 B. C. C. 81; S. C. 1 Ves. jun. 143.

(c) 11 East, 668.

(d) 4 M. & S. 366.

(e) 1 B. & Al. 137.

(f) 5 B. & C. 866.

(g) 1 Atk. 469.

(h) 5 Ves. 495.

(i) 2 M. & K. 149.

(k) 1 Y. & C., C. C. 718.

(l) 1 B. & B. 449.

(m) 3 Scott's N. R. 409.

(n) 12 Jur. 591.

(o) 9 Rep. 127.

(p) 1 P. Wms. 663.

(q) 1 East, 227.

(r) 5 East, 547.

(s) 12 East, 251.

(t) 4 M. & S. 61.

(u) 4 Ves. 227.

(v) 2 B. & P. 485.

(w) 7 Taunt. 209; S. C. 2 Marsh. 517.

Doe d. Jesson v. Wright (a); *Croly v. Croly* (b); *Irwin v. Cuffe* (c); *Briscoe v. Briscoe* (d); *Martin v. McCausland* (e); *Allen v. Allen* (f); *Phillips v. Phillips* (g).

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Cur. ad. vult.

The Court on this day sent the following certificate :—

This case has been argued before us by Counsel for the petitioner and the said Robert Irwin Mahon. We have considered it, and are of opinion that under the will of Joseph Mahon, in the said case stated, his son George Mahon took an estate for the term of his life in one undivided sixth part of the lands of Mullaghderg, with remainder to his children living at the date of the said will, for their lives, with power to the said George by his will to distribute same among them in such proportions as he thought fit, with remainder to the said George Mahon in *quasi* tail, with other remainders over; and that under the said will the said George Mahon took an immediate estate in *quasi* tail in one other undivided sixth part of said lands, with certain powers and remainders over; and we are of opinion that by the renewal of 1817 in the case stated, if any interest under the original lease was then subsisting at law, the estates in *quasi* tail of the said George Mahon in the said two undivided sixth parts of said lands were converted into estates in *quasi* fee-simple, vested in the said George Mahon and the other lessees in the said renewal of 1718; but whether as joint tenants or tenants in common, or whether on the death of the said George Mahon the said Robert Irwin Mahon took any estate in the said two undivided sixth parts of said lands, we are unable to state the particulars of the said renewal, or the times of the deaths of the lessees therein, not being stated in the case. We are also of opinion that by the said will another undivided third part of said lands was limited to Elizabeth the widow of the said testator for life, with remainder to the said

June 17.

(a) 2 Bligh, 1.

(b) Batty, 1.

(c) Ha. 30.

(d) Ibid. 34.

(e) 4 Ir. Law Rep. 340.

(f) 4 Ir. Eq. Rep. 884; S. C. 2 Dr. & War. 307.

(g) 10 Ir. Eq. Rep. 513.

T. T. 1851. *testator's son John in quasi tail, with remainder to the testator's sons*
Common Pleas. George and Joseph as tenants in common in *quasi* tail, with cross
In re remainders between them, with remainder to testator's daughter
MAHON'S Jane in *quasi* tail; but we are unable to state what effect the
ESTATE. renewal of 1817 had on the estates created by said will in said last
mentioned one-third of said lands, it not appearing whether said
renewal was made with the concurrence of testator's widow, who
then had a life estate in said one undivided third part of said lands.
We are also of opinion that the remaining one undivided third part
of said lands was by said will vested in testator's son Joseph in *quasi*
tail, with several remainders over; and that by the said renewal
of 1817, if any interest under the original lease was then subsist-
ing at law, the estate in *quasi* tail of the said Joseph in the said
last mentioned one undivided third part of said lands was enlarged to
an estate in *quasi* fee-simple, and vested in the said Joseph Mahon,
George Mahon, and the other lessees in said renewal of 1718; but
whether as joint tenants or tenants in common, or whether on the
death of the said George Mahon the said Robert Irwin Mahon took
any estate in the said one undivided third part of said lands, we are
unable to state the particulars of said renewal, or the time of the
deaths of the lessees therein, not being stated in the case.

JAMES HENRY MONAHAN.

N BALL.

J. D. JACKSON.

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1851.

Jan. 14, 15,

17.

May 2, 9.

MORROW v. M'GAVER.

CASE, for slander.—The declaration contained two counts.

The first count stated in the inducement that before and at the time of the committing of the grievances the plaintiff had been a land-agent for collecting rents and otherwise managing estates in lands on behalf of the landlords and owners thereof, and as a receiver under Courts of Equity in causes and matters therein depending, and that he had always exercised such employment with honesty and integrity towards his employers, and with fairness

To an action of slander for speaking and publishing of the defendant in his capacity of land agent and receiver, at a meeting of landowners, the following words:—"I quite agree with Mr. F.,

that the present meeting was got up by the landlords for the purpose of having their rents raised; for I of my own knowledge know a number of well conducted tenants in my own neighbourhood who have been held up to high rents, and have been compelled to give up their land for the purpose of enabling an individual (meaning the plaintiff) to get it into his own possession (meaning the said tenants were compelled by the plaintiff to give up their land for the purpose of enabling the plaintiff to get it into his own possession); and one man, having six sons, was driven out of his farm to satisfy the wishes of this person; and another tenant, who took compassion on that man and let him in, was sent to by the agent, and the bailiff told him that if he sheltered him he would be put out himself; and another most respectable man, although he wore a frieze coat, was also called upon by the same person (meaning the plaintiff) to give up his farm at forty-eight hours' notice, as he (meaning the plaintiff) wished further to enlarge his demesne and make gravel walks; and upon his asking 'where am I to go?' he was told, 'you have no person but your old wife and yourself, and you may go into the byre (meaning to live in the cow-house of the said man); but if you do not give me up the land, I will put you into gaol for the rent you now owe;' he (meaning the same man) then said to the agent, 'you came to me three years ago, and my son, who was then recovering from fever, took a shivering, and you killed him, are you now going to kill me?' It turned out too true. Andy Egan was the man; he took to his bed the next day, I (meaning the defendant) attended him; and he was dead in one week, murdered by that agent, the same as his son was a few months before." The slander, as alleged in the second count, was, with some verbal differences, the same as that in the first. Held, that a plea of justification to so much of the words stated in both counts as are printed in italics was bad, the words justified by the plea imputing only acts of harshness and oppression by the plaintiff in his character of agent, while the slander alleged in the declaration imputed the commission of those acts for selfish and personal motives.

The defendant having pleaded not guilty to the whole declaration, on which issue was joined, at the trial the Judge directed the jury that they should be satisfied that the words laid in the declaration, or some of them, being of a defamatory character, had been spoken by the defendant; and no objection was taken to his charge in this particular. Held, that the plaintiff was estopped from contending that it was sufficient to prove the substance of the words alleged; and it being admitted that there was no proof of sufficient of the actual words alleged to sustain the action, a venire de novo was awarded.

If the words alleged in the declaration are proved to have been spoken, the fact that they are proved not to have been spoken continuously, as stated in the declaration, will not constitute a variance.

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M'GAVER. towards the tenants over whom he acted as such agent and receiver, and that he had not been guilty, or, until the time of the committing of the grievances, suspected of being guilty, of the oppression, cruelty, fraud and misconduct as such agent and receiver thereafter mentioned, to have been imputed to him by the defendant. That amongst others he had acted as the land agent of Frederick Thomas Jessop, from whom one Andy Egan and divers other persons held lands as tenants; that a meeting of landowners and proprietors of estates in the county of Longford was convened, upon a requisition to the High Sheriff, for the purpose of petitioning Parliament for a restoration of protective duties upon corn, and that it was attended by divers land proprietors and other persons resident in the county of Longford; that the defendant was present at the meeting, and seconded an amendment, to a resolution which had been moved and seconded; the declaration then alleged that in doing so, he, in presence of certain persons, landlords and proprietors of estates in land in the said county, well knowing the premises, but intending to bring the plaintiff into public scandal, infamy and disgrace amongst his neighbours, and to injure the plaintiff in his employment of land-agent, and to cause it to be suspected and believed by those neighbours, and by others who might employ the said plaintiff as such agent and receiver as aforesaid, that the said plaintiff had conducted himself corruptly, dishonestly, fraudulently, oppressively and cruelly in his said employment of land-agent and receiver, and to injure his reputation as such land-agent and receiver, in a certain discourse, &c., to wit, in his said address to the said meeting, in presence of the said several persons, falsely and maliciously spoke and published of and concerning the plaintiff, and of and concerning the said plaintiff in his capacity of land-agent and receiver of rents, and of and concerning his conduct in the way of his said employment, the false, scandalous, malicious and defamatory words following, that is to say:—"I quite agree with Mr. Fleming" (meaning the mover of the said amendment of the said resolution) "that the present meeting (meaning the said meeting of the landed proprietors of the said county of Longford, convened as aforesaid) "was got up by the landlords for the purpose of having their rents

"raised; for I of my own knowledge know a number of well con-
 "ducted tenants in my own neighbourhood who have been held up
 "to high rents, and have been compelled to give up their land for
 "the purpose of enabling an individual (meaning the plaintiff) to
 "get it (meaning the land so alleged to have been given up) into
 "his (meaning the plaintiff's) own possession (meaning that the said
 "tenants were compelled by the plaintiff to give up their land for
 "the purpose of enabling the plaintiff to get it into his own posses-
 "sion); and one man (meaning one of the said tenants), having
 "six sons, was driven out of his farm to satisfy the wishes of this
 "person (meaning the plaintiff), and another tenant, who took
 "compassion upon that man and let him in (meaning into the house
 "of the said other tenant), was sent to by the agent (meaning the
 "plaintiff), and the plaintiff told him (meaning the said other tenant)
 "that if he (meaning the said other tenant) sheltered him (meaning
 "that one man who was as aforesaid stated to have been driven out
 "of his farm) he would be put out himself (meaning that the plaintiff
 "would put the other tenant out of his holding); and another most
 "respectable man (meaning another of the said tenants), although
 "he wore a frieze coat, was also called upon by the same person
 "(meaning the plaintiff) to give up his farm at forty-eight hours'
 "notice, as he (meaning the plaintiff) wished further to enlarge his
 "(meaning the plaintiff's) demesne (meaning by adding thereto the
 "said last mentioned farm), and make gravel walks; and upon his
 "(meaning the man who as aforesaid was by the said defendant
 "stated to have been called upon to give up his farm at forty-eight
 "hours' notice) asking 'where am I to go,' he was told (meaning
 "that he was told by the plaintiff) you have no person but your
 "old wife and yourself, and you may go into the byre (meaning
 "to live in the cow-house of the said man); but if you do not give
 "me (meaning the plaintiff) up the land (meaning the farm of land
 "of the said man so by the said defendant alleged to have been
 "required to quit the same at forty-eight hours' notice), I (meaning
 "the said plaintiff) will put you into gaol for the rent you now owe;
 "he (meaning the same man) then said to the agent (meaning the
 "plaintiff), 'you came to me three years ago demanding possession

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E. T. 1851. “(meaning possession of the said man’s farm), and my son, who
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 MORROW “‘ing the plaintiff) killed him, are you (meaning the said plaintiff)
 v. “‘now going to kill me?” It turned out too true. Andy Egan was
 M’GAVER. “the man (meaning the man so by the said defendant alleged to
 “have been required to give up his farm of land at forty-eight hours’
 “notice, and who the said defendant alleged to be a most respectable
 “man, although he wore a frieze coat); he (meaning the said Andy
 “Egan) took to his bed the next day; I (meaning the plaintiff)
 “attended him in his illness, and he was dead in one week, murdered
 “by the agent (meaning the plaintiff) the same as his son was
 “(meaning was killed by the treatment which the said man had
 “received from the plaintiff) a few months before; the same agent
 “(meaning the plaintiff) told him (meaning the said Andy Egan)
 “that another son of his (meaning of the said Andy Egan) was a
 “ribbonman, and he (meaning the plaintiff) was the cause of
 “banishing him from the country. This is the treatment which
 “may be expected from landlords and their agents. I (meaning the
 “defendant) would not come forward to make any statement that
 “was not true; and I (meaning the defendant) did not state any
 “thing but what I know of my own knowledge; and Mr. Hugh
 “Morrow (meaning the plaintiff) is the person to whom I allude,
 “and who has thus treated those people (meaning the said first
 “mentioned tenants, the said Andy Egan, and the said son of the
 “said Andy Egan), and murdered an honest man, Andy Egan
 “(meaning the aforesaid Andy Egan).”

The second count was in all respects the same as the first, except that the *colloquium* was alleged to have taken place in presence of divers good and worthy subjects of our Lady the Queen.

The defendant pleaded—first, not guilty.

Secondly, as to speaking and publishing of the following words, in the first and second counts of the said declaration mentioned, that is to say:—“And another most respectable man, although he wore
 “a frieze coat, was also called upon by the same person to give up
 “his farm at forty-eight hours’ notice.” And also the following words in the said first and second counts in the said declaration

mentioned, that is say :—" And upon his asking where am I to go, " he was told, ' you have no person but your old wife and yourself, " " and you may go into the byre ; but if you do not give me up the " " land I will put you into gaol for the rent you now owe ; " " *Actio non*, because he saith that before the speaking and publishing of the said several words of and concerning the plaintiff in the said first and second counts of the said declaration mentioned, to wit, &c., at, &c., a certain respectable man, to wit one Andy Egan, to wit, the said Andy Egan hereinbefore and in the said first and second counts of the said declaration mentioned, was then and there required by the said plaintiff to give up to the said plaintiff, at the expiration of forty-eight hours after having received notice to quit, a certain farm which the said Andy Egan then held, which said farm was part of a certain estate of which the said plaintiff was then and there the manager ; and the defendant saith that the said Andy Egan did, upon the occasion of being so required by the said plaintiff to give up to the said plaintiff the said farm at the expiration of the said forty-eight hours as aforesaid, ask the said plaintiff where he the said Andy Egan should go upon his so giving up the possession of the said farm, and the said plaintiff did then and there tell the said Andy Egan that he the said Andy Egan had no person but his the said Andy Egan's old wife and the said Andy Egan himself, and that he the said Andy Egan might go into the byre ; and the said plaintiff then and there informed the said Andy Egan that if he the said Andy Egan did not give up to the said plaintiff the said farm of land which he the said Andy Egan had been required to quit at the expiration of forty-eight hours as hereinbefore mentioned, he the said plaintiff would put him the said Andy Egan into gaol for the rent of the said land, which he the said Andy Egan then owed to the owner of the said estate, of which the said plaintiff was then and there the manager as aforesaid, wherefore he the said defendant, at the several times when and soforth, in the said first and second counts mentioned, did speak and publish, &c.

The plaintiff joined issue on the plea of not guilty, and demurred to the second plea, on the ground that it was pleaded to part only of the slander in the declaration mentioned, whereas the slander was

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E. T. 1851. one and not divisible, and that the part pleaded was not relied on as
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 M'GAVER. in itself constituting any distinct cause of action but as amounting
 to a cause of action when taken in conjunction with the other parts
 of the said slander mentioned in the declaration, and that the
 slander justified was not the same as that complained of in the
 declaration, inasmuch as the latter charges the plaintiff with doing
 the several acts mentioned in the introductory part of the second
 plea, in pursuance of fraudulent, treacherous, unlawful and criminal
 designs and intentions ascribed to the plaintiff by the slander set
 out in the declaration, and in order to carry the same into effect;
 whereas the plea only justifies that part of the slander contained in
 the introductory part of the said plea as standing alone, and that the
 second plea consists of matters of evidence, and that the supposed
 facts did not, even if true, justify the publication of the slander, and
 that the plea offers to put in issue matters which are not issuable,
 and that it does not confess or avoid the substantial part of the
 slander as alleged in the declaration.

Joinder in demurrer.

W. C. Henderson (with whom was *Fitzgibbon*), in support of
 the demurrer.

The defendant attempts to justify the libel complained of by
 selecting a detached portion of it, and pleading a justification to
 that to the effect that the acts imputed are true; but the passage
 selected for justification derives its sting from its connection with
 those observations of which the declaration complains, and which the
 plea omits to justify. The whole libel taken together conveys the
 imputation that the plaintiff exercised his authority as an agent
 with harshness and for his own aggrandisement; it is no answer to
 such a charge to allege that the defendant acted with oppression
 and severity towards the tenantry; that he was instrumental in
 evicting some of them from their houses, and thereby causing their
 deaths, because such acts may have been done in the exercise of
 strict legal rights, and by the direction of the plaintiff's employer.
 In *Stiles v. Nokes* (a) it was held libellous to publish a highly

(a) 7 East, 492.

coloured account of judicial proceedings interspersed with reflections on the plaintiff's character, and that a publication of such parts of the supposed libel as contained an account of the trial, &c., was not good. This doctrine has been repeatedly affirmed in *Roberts v. Brown* (a); *Mounteney v. Wotton* (b); *Eaton v. Johns* (c). The fair result of all the cases is, that where a number of statements tend to one conclusion and imputation, a single sentence cannot be selected and separately justified; it is not denied that where the libel is in its nature divisible, as in the case of *Clarkson v. Lawson* (d), the defendant will be permitted to justify a portion, on the ground that if the defendant were not permitted to do so, the plaintiff might recover damages in a case where the substantial part of the libel was justified; but even there Tindal, C. J., says:—"I agree that where the charge complained of is not severable in its nature, the defendant must justify to the full intent of the charge." *Onslow v. Horne* (e); 1 *Starkie on Libel*, pp. 117 to 120.

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Holmes (with whom was *J. D. Fitzgerald*), in support of the plea.

The cases relied on by the plaintiff, in support of the demurrer, do not sustain the position sought to be established. *Clarkson v. Lawson* was decided upon this ground, that the plea began with professing to answer the whole declaration, when it was only an answer to part; but on the second argument of the case on the amended plea (f) the Court held that the libel was divisible, and that a plea justifying part of it was sufficient. In *Eaton v. Johns* Lord Abinger lays down that where a libel is divisible part may be pleaded to; and the case was decided on the ground that the words there pleaded to were not divisible; but all went to make up a charge of general insolvency. The case of *M'Gregor v. Gregory* (g), in which all the authorities are collected, establishes the same position.

(a) 10 Bing. 519.

(b) 2 B. & Ad. 673.

(c) 11 Law Jour. N. S. Exch. 150.

(d) 6 Bing. 266, 589.

(e) 3 Wils. 186.

(f) 6 Bing. 587.

(g) 11 M. & W. 277.

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The portion of the libel justified by the plea contains a distinct slanderous charge, although its effect may be heightened by other passages in the imputed slander. The passage relied upon by the plaintiff as giving a colour to the rest of the slander, viz., "as he wished further to enlarge his demesne and make gravel walks," may either refer to the motive ascribed to the plaintiff, or may mean that these words were spoken to the tenant by the plaintiff's bailiff; we are at liberty to assume the former to be the construction of the sentence, the plaintiff not having affixed any particular meaning to the sentence by his innuendo; we could not then justify the motive of the plaintiff, which is the act of his mind.—[MONAHAN, C. J. Even supposing the true construction of the declaration to be that the plaintiff's bailiff called upon Egan, and required him to give up his farm at forty-eight hours' notice, and that you allege as a matter of fact, this was done for the purpose of enabling the plaintiff to enlarge his demesne and make gravel walks, you had no right to ascribe the motive if you could not justify it, which you might have done by stating facts from which that motive might be inferred.]—If the Court decide the present plea to be bad, it must be on the ground that the words covered by it are not actionable.

Secondly—The declaration does not contain any cause of action on the face of it. The plaintiff has abandoned the interpretation which might be attributed to the defendant's words—viz., that he intended to impute to the plaintiff the commission of a felony; and the only question is, do the rest of the words, alleged to have been used by the plaintiff, convey a slanderous imputation? Unless the slander has a direct tendency to affect the plaintiff in his profession, he cannot recover without proof of special damage, and none such is alleged. The defendant did not seek to convey any imputation on the plaintiff as between himself and his employers. He charges both as combining to oppress the tenants, and the acts of the agent as done with the sanction of the landlord; nor is there any thing to show that the plaintiff had not become the owner of the land himself, and that he expelled the tenants in exercise of his legal rights.

Fitzgibbon, in reply.

Cur. ad. vult.

Previous to the argument of the demurrer the case was tried on the issue joined on the first plea before BALL, J., at the Sittings after Trinity Term 1850, when a verdict was found for the plaintiff. The case now came on for argument on a bill of exceptions taken to the charge of the learned Judge.

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The bill of exceptions stated that, in order to support the issue joined by him, the plaintiff, amongst others witnesses, produced Frederick Thomas Jessop, who proved that the plaintiff had been his land-agent since the year 1835; that there was a person on his estate of the name of Andy Egan; that the witness had never interfered in any matter between the plaintiff and Egan. On cross-examination this witness stated that the plaintiff had become his tenant for two denominations of land, and that he then held that part of the land which was formerly in the possession of Andy Egan, and which adjoined the plaintiff's land.

The bill of exceptions then stated that the plaintiff next produced Sir George Fetherstone, who deposed that he was present at the meeting mentioned in the declaration; that a resolution was proposed and seconded; that the defendant then made a speech, the precise words of which the witness did not recollect; that he heard the defendant name a person; that he was called on by the meeting to name the person he alluded to, and that he named the plaintiff; that the defendant talked of the plaintiff's cruelty in having destroyed some tenants, and caused their deaths; that he could not swear positively to any words. On cross-examination this witness said that the defendant did not name any person until called upon, when he named the plaintiff and another.

The bill of exceptions then stated that the plaintiff proved certain powers of attorney from several land proprietors, and amongst others, Sir J. Fetherstone, and the plaintiff's appointment as receiver in the matter of Jessop a minor. It then stated that the plaintiff produced a witness named Edwin Ledwith, who deposed that he was present at the meeting; that the High Sheriff was in the chair; that the plaintiff and defendant were both present; that a resolution was proposed and seconded; that an amendment was proposed by Mr. John Fleming, and seconded by the defendant;

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that the witness thought he could state some of what the defendant said; that the witness made a memorandum of it; that the defendant commenced by making a violent attack on landlords and agents generally; that he then said:—"I know a man who has turned out several families for the purpose of enlarging his own demesne and making gravel walks; a man who could not bear a thatched cabin in sight of his house. I know of a landlord who had promised a tenant an abatement of five shillings an acre for ground for which he paid five-and-thirty, and the agent refused to allow him more than two shillings and six pence when he came to pay his rent, and on that account refused to allow him poor-rate, because the rent was abated two shillings and six pence, when he was promised five shillings; that the agent had then seized upon his goods, and that he was then broken down in consequence of a rack rent; proceedings were taken against the tenant, and I suppose he will be put in gaol. One family that this agent had turned out had been allowed by another tenant on the estate to take shelter in the other tenant's house; the agent sent the driver or bailiff to have the tenant who got the shelter removed, or the agent would have the family turned out who had given them shelter, if not removed;" that some person called on the defendant to name the person to whom he alluded; the defendant hesitated for a moment, he then stated:—"I am here as a clergyman, and I am not stating any thing that I do not know of my own knowledge. Mr. Hugh Morrow is the man." That these words were spoken immediately after the defendant said he was a clergyman, and before he said any thing of Andy Egan's dying in consequence of cruel treatment; that he then said Morrow went to Egan and demanded possession of his farm; that Egan asked Morrow where he would go to if he gave it up; Morrow told him he might go into the cow-house; that the witness thought "byre" was the word the defendant used, but that he was not sure whether he made use of the word "byre" or cow-house; that the defendant said:—"The man Egan had been in a bad state of health before this; that he was so frightened, he went in and took to his bed; he sent for me and said to me, 'I am on my death bed, and Mr.

"Morrow has killed me;" and sure enough the man was dead in a week, murdered by Mr. Morrow; although he wore a frieze coat, he was as respectable a farmer as any in the county of Longford; the landlords, by their cruel treatment, are driving people to death like Andy Egan." That the defendant said that Mr. Morrow had killed the father, or put an end to him, as he had done to the son three years before; that he did not exactly recollect any more of what the defendant said about that son; before the defendant mentioned names the witness recollected the defendant saying that the plaintiff had turned out the tenants to add their lands to his demesne; but that he did not know whether he alluded to Andy Egan or not; that he could not give the precise words; but thought they were:—"I know a person who has turned out several families who had paid their rents, and for the purpose of enlarging his demesne." On cross-examination this witness said, "I do not swear positively or unequivocally that these are the words the defendant used; in no instance will I swear it."

The bill of exceptions stated that the next witness produced by the plaintiff, Ralph Dopping, deposed as follows:—"I was present at the meeting; I recollect the defendant making a speech; I remember one part of it in which the defendant spoke of a man named Egan; he said that a person had gone to Egan and told him he must have possession of his house and land within a certain time; he mentioned the time but I do not remember it; he told him that if he did not give him possession of the house and lands within the time he mentioned, he would come and sell every thing he had, even the very bed he lay on; the man then said 'are you come to kill me as you did my son three years ago?' I forget what occurred there; but the defendant said after, 'that man Egan died murdered by that person;' I am not sure as to the word 'person,' but I believe it was that word; when he was called before by Mr. Sleator to name, he then said, with some hesitation, 'Mr. Hugh Morrow is the man I mean;' after he had named him he said he came there as a clergyman; he named the tenant to whom this person had gone, Egan was the name; he said what was all this done for? it was done to enlarge his demesne, and said something about gravel walks; I

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E. T. 1851. "remember something about a barn ; it may have been a byre ; I do
Common Pleas. "not recollect any other expression." The next witness, Mr. Sleator,
 MORROW v. deposed as follows :—" I was present at the meeting ; I took notes of
 'GAVER. "the defendant's speech ; the defendant commenced by saying that
 "throughout the country there was great persecution practised by the
 "landlords ; he then said that in his own parish the persecution was
 "carried on to a very great extent ; that there was an individual in
 "that parish who managed property, and he had turned out one family,
 "and called on another man, as respectable as any in the parish,
 "Andrew Egan ; that he ordered him out of his house, and that Egan
 "asked him where he would go to ; that this individual replied ' into
 "a byre, or any where ; ' that in the course of a few days he Andrew
 "Egan died, and that he the said defendant attended his remains to
 "the grave, and that he was clearly murdered by the plaintiff ; he then
 "made some observations on that, and said that three years before,
 "this individual was the cause of his son's death, who was then lying
 "in a fever ; I recollect that he said that the man died of fright, but I
 "did not take these words down ; he said that this person had come to
 "Egan's house, at the time Egan's son was in fever, to seize his pro-
 "perty, and that the young man was so much frightened that he died ;
 "on making these charges I called on the defendant to name ; he
 "hesitated, and then the High Sheriff and all the gentry stood up and
 "cried ' name, name ; ' he then hesitated a moment or so and named
 "Hugh Morrow the plaintiff ; I knew very well he meant the plain-
 "tiff, and knew the plaintiff to be the agent to Mr. Jessop, whose
 "property it was." The next witness, George Lefroy, deposed that
 the defendant in his speech recounted a conversation which had taken
 place between him and Egan, at Egan's bedside, in the course of
 which Egan said that a person, not then mentioned, had gone to him
 and asked him to give up his land, and he (Egan) asked him where
 was he to go, and the reply was "you may go into the byre or cow-
 house, but that he must have his land."

The plaintiff having closed his case, the learned Judge directed
 the jury—first, that they should be satisfied that the words laid in
 the declaration, or some of them, had been spoken by the defendant
 of the plaintiff ; secondly, if spoken, that they were spoken by the

defendant of the plaintiff in his character of land-agent and receiver, and imputed to him the commission of a felony; thirdly, that the words spoken were calculated to injure the plaintiff in that character; and told them that if they believed the words alleged had been spoken, they were in his opinion defamatory; fourthly, that if the language used was calculated to defame the plaintiff's character, the law would imply malice, and that it was not necessary that the jury should be satisfied that the defendant entertained actual malice.

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By consent of the plaintiff's Counsel his Lordship withdrew from the consideration of the jury the question as to whether the defendant, in using the words, imputed to the plaintiff the commission of a felony.

The plaintiff excepted to the charge of the learned Judge—first, on the ground that he should have directed a verdict for the defendant, inasmuch as the words imputed to have been spoken by the defendant were in the declaration alleged to have been spoken continuously, whereas the evidence proved that the defendant did not name the plaintiff until called upon.

Secondly, on the ground that his Lordship should have informed the jury that there was evidence that in using the alleged defamatory language the defendant did not name the plaintiff until pressed to do so, which, if they believed, was evidence to show an absence of malice on his part.

Thirdly, on the ground that his Lordship should have told the jury that none of the alleged defamatory words were calculated necessarily to prejudice the plaintiff in his character of agent and receiver.

Fourthly, that his Lordship should, in the absence of proof of any special damage, have directed a verdict for the defendant.

Fifthly, on the ground that the words alleged to have been spoken, *and of which there was evidence to go to the jury*, were not actionable in themselves, nor calculated to injure the plaintiff in his character of land-agent or receiver.

The jury found for the plaintiff on the plea of not guilty, and assessed damages at £300, and contingent damages on the words "covered by second plea at six pence."

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Holmes and J. D. Fitzgerald, in support of the exception.

There is a material variance between the words as alleged to have been spoken and the words as proved. The declaration alleges the words to have been spoken continuously, and in the order in which they are there stated. The proof is—first, that the words were spoken in a different order; and secondly, that the plaintiff was not named until the defendant was called upon by the chairman to do so, and then not without hesitation: *The King v. Berry* (a); *Avarillo v. Rogers* (b). In the latter case the words laid were, “he deserves to be hanged for a note he forged on A;” and the words proved were, “you deserved to be hanged,” &c. It was held that the variance was fatal, for there is a great difference between words spoken in a passion to a man’s face, and words spoken deliberately behind his back.—[MONAHAN, C. J. In those cases the words alleged to have been used were not used in fact. Your present objection is not that the defendant did not use the words alleged, but that he used them under circumstances not mentioned in the declaration. That is not a variance, but an omission to state the circumstances under which the words were used.—BALL, J. Would you hold it necessary to state that the words constituting a slander were spoken in a passion?—That might alter the effect of the words.

Secondly—We say that though the action would lie on the inference of legal malice, yet the fact that the defendant did not name the plaintiff until called upon to do so, was a material circumstance to be left to the jury on the question of damages.—[MONAHAN, C. J. Is not the fair inference from that exception that the Judge should have left as a question to the jury whether this fact rebutted the inference of legal malice? Would not that amount to saying that the Judge should have left the question of malice to the jury? If your objection be that the Judge omitted to state to the jury a fact which you thought material for your client in estimating damages, that is not the proper subject of an exception.]—*Pearson v. Lamaitre* (c) decides that even in a case where malice is implied

(a) 4 T. R. 217.

(b) Bull. N. P. 7th ed., 5, a.

(c) 5 M. & G. 700.

by the law the plaintiff will be allowed to give further evidence for the purpose of proving malice in fact; and if so, he should be permitted to give evidence to rebut the inference of legal malice. The charge of the learned Judge amounts to this:—the law infers malice, and therefore I will not leave this fact to them to rebut it.—[TORRENS, J. If the Judge had told the jury that they were not to take that point into consideration, you would then have ground for that exception.]

As to the third exception, by which we except to that portion of his Lordship's charge in which he told the jury that the words spoken were *per se* defamatory: assuming the construction put upon the words "as he wished further to enlarge his demesne and make gravel-walks," on the last argument, to be correct, there is nothing to show that these words were spoken by bailiff under the plaintiff's direction; nor does it appear whose the farm was from which the tenant was evicted, or under what circumstances that eviction took place. The lease may have expired, and the tenant have been lawfully ejected. Words which are not actionable in themselves, but which become so only when spoken in relation to the occupation or profession of the person, must be alleged to have been spoken in that sense: 1 *Saund.* p. 248, n. 3; *Daniel v. Barry* (a); and the Court will arrest judgment, although the jury have found that the words are libellous.

The following authorities were cited:—*Archbold's Practice*, p. 431; *Vines v. The Mayor of Reading* (b); *M'Alpine v. Mangnall* (c).

As to the fifth exception. It is sufficient for us to show that there was a misdirection by the learned Judge, although we may not be able to establish that he should have directed the jury as we required: *Vines v. The Mayor of Reading* (d); *Househill Coal Company v. Neilson* (e).

(a) 4 Q. B. 59.

(b) 4 Bing. 9; S. C. 12 Moo. 205.

(d) 4 Bing. 7.

(c) 3 C. B. 496.

(e) 9 Cl. & Fin. 788.

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Henderson and Fitzgibbon, for the plaintiff.

There is a distinction between declarations in libel and slander; and greater latitude is, from the reason of the case, allowed in the latter. The slanderous observations were all made in the present case before the plaintiff was named. It cannot be contended that it is necessary to state all the circumstances under which a slander has been uttered: *Sir J. Sydenham's case* (a); *Doncaster v. Hewson* (b).

With regard to the second exception. If this be allowed, the question of malice or no malice should have been left to the jury; and they should have been told that the slander, having been spoken in answer to a question, rendered the communication privileged.

The following authorities were referred to: *Orpwood v. Barkes* (c); 2 *Starkie on Evid.* p. 618; *Archbold's Practice*, 8th ed., p. 431.

May 2.

The COURT on this day directed the case to be re-argued by one Counsel on each side on the following points:—

First—The fifth exception to be re-argued by one Counsel on each side; and in doing so, it should be considered whether the doctrine stated by Lawrence, J., in *Maitland v. Goldney* (d), or by Abbott, C. J., in *Walters v. Mace* (e), should be applied to the present case; and Counsel should point out the precise paragraphs of the declaration which he considers sustained by the evidence, and the precise evidence applicable to each paragraph.

Secondly—The demurrer also to be re-argued by the same Counsel; and in doing so, that it be considered whether the words justified are slanderous; and if they are, whether the defendant was warranted in selecting those particular words for justification.

Thirdly—What should the judgment be in the event of the Court overruling the demurrer and all the exceptions; whether in that event the damages have been properly assessed.

(a) Cro. Jac. 407.

(b) 2 M. & R. 176.

(c) 4 Bing. 261.

(d) 2 East, 425.

(e) 2 B. & Ald. 756.

For the plaintiff it was argued that the rule laid down by Lawrence, J., in *Maitland v. Goldney*, "that though the plaintiff need not prove all the words laid, yet he must prove so much of them as is sufficient to sustain his cause of action, and it is not enough for him to prove equivalent words of slander," should be taken with reference to the facts of the case. That the defendant by his plea in that cause sought to divest himself of liability in respect of a slander alleged to have been uttered by a third person, and refuted by him by saying that the alleged author of the slander used words "to the effect" stated in the libel. This would give the plaintiff no cause of action against the author of the slander, as it only gave the defendant's impression of the words used. That on the present exception it was sufficient to prove words substantially the same, provided they are actionable: 2 *Stark. on Ev.* p. 618; *Robinson v. Willis* (a); *Doncaster v. Hewson* (b); *Orpwood v. Barks* (c); *Rutherford v. Evans* (d). That the imputation conveyed by the slander alleged in the declaration was, that the defendant availed himself of his position as agent to put the tenants under high rents, and thereby get the lands into his own possession, and that this charge was substantially proved. That if the defendant objected to the variance at the trial, the plaintiff would have applied for liberty to amend, and that the bill of exceptions did not point with precision to the variance.

On the demurrer to the plea the following additional authorities were cited:—*Com. Dig.* Action on the Case for Defamation, G. 10; *The King v. Aylett* (e); *The King v. Horne* (f); 1 *Chitty on Pl.*, 6th ed., p. 407; *Cooke on Defamation*, p. 119.

For the defendant it was argued, that on the face of the record the plaintiff was estopped from insisting that it was sufficient to prove the substance of the alleged slander, inasmuch as the learned Judge informed the jury that they must be satisfied that the very

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(a) 2 *Stark.* 194.

(c) 4 *Bing.* 261.

(e) 1 *T. R.* 70.

(b) 2 *M. & R.* 176.

(d) 6 *Bing.* 451.

(f) *Cowp.* 684.

E. T. 1851. words alleged had been spoken, and no exception was taken to his
Common Pleas. reply in this respect.

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As it appears on the bill of exceptions in this case that the Judge at the trial, in his charge to the jury, informed them that they should be satisfied on the evidence that the words laid in the declaration, or some of them, being of a defamatory character, had been spoken by the defendant of the plaintiff, to which no objection was taken by the plaintiff's Counsel, we do not think it is now open to plaintiff to contend that it was not necessary to prove some portion of the actual words stated in the declaration ; but that it was sufficient to prove words of the same substance or import. And as it is admitted by the plaintiff's Counsel that he cannot show any evidence of a sufficient part of the actual words stated in the declaration to have been used, we are of opinion that this exception must be allowed, and a *venire de novo* awarded. We are not in this case called on to consider whether, if the Judge had charged according to the doctrine laid down by Abbot, C. J., in *Walters v. Mace*, namely, that it was sufficient to prove the substance of the words laid, such a doctrine would not have been correct.

Judgment reserved upon the demurrer and the other exceptions.

May 9.

MONAHAN, C. J.

In this case, on a former occasion, we ruled in favour of the fifth exception, and on that exception there must therefore be a *venire de novo*.

With regard to the other four exceptions, we do not consider them to be well founded. The first exception is on the ground that the words laid in the declaration were stated to have been spoken continuously, and that there was in that respect a variance from the words as proved. We conceive that there is no variance on that ground ; and that if the words alleged in the declaration are proved

to have been spoken, it is no objection that they were not proved to have been spoken continuously.

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With regard to the second exception, which was on this ground, that the words alleged and proved having been spoken in reply to a question, that fact was sufficient to rebut the inference of malice. We do not think this to be the case, as it would be the necessary consequence of this doctrine that the plaintiff should state in his declaration all the circumstances under which the words constituting the slander were spoken, which we do not think necessary.

With regard to the third exception, which was on the ground that the Judge directed the jury that the words constituting the slander were in themselves defamatory, we are of opinion that the words were of a defamatory character, and tended to injure the plaintiff's character.

On the fourth exception, as we consider the words to be defamatory in themselves, we do not think it was at all necessary to have proved special damage in order to entitle the plaintiff to recover in this action.

The question which arises on the demurrer is, whether the plea, which professes to answer a portion of the slander taken out of the centre of the colloquium alleged in the declaration, is sufficient? The words justified are these:—"And another most respectable man, although he wore a frieze coat, was also called upon by the same person to give up his farm at forty-eight hours' notice. And upon his asking 'where am I to go?' he was told, 'You have no person but your old wife and yourself, and you may go into the byre; but if you do not give me up the land, I will put you into gaol for the rent you now owe.'"

Omitting the following words alleged in the declaration as part of the slander:—"I of my own knowledge know a number of well conducted tenants who have been held up to high rents, and have been compelled to give up their land for the purpose of enabling an individual to get it into his own possession; and one man having six sons was driven out of his farm to satisfy the wishes of this person; and another tenant, who took compassion on that man, was sent to by the agent, and the bailiff told him that if he shel-

E. T. 1851. "tered him he would be put out himself;" and also omitting,
Common Pleas. after the words "forty-eight hours notice" in the sentence as set
out in the plea, the words "as he wanted further to enlarge his
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to decide whether these words, if alone spoken, would be sufficient to
sustain an action; it is enough for us to say that if these words were
proved in the present action, the declaration charging the speaking
of the other words, proof of these words alone, would not be sufficient
to sustain the action, as the misconduct thereby charged is different
from that which would have been charged by the words justified
if standing alone, the latter charging merely harsh treatment or
oppression; whereas the charge conveyed by the omitted words is
that of harsh treatment and oppression for the plaintiff's personal
and selfish purposes. The demurrer to the plea must therefore
be allowed.

Demurrer to the second plea allowed; first, second, third and
fourth exceptions overruled; fifth exception allowed.

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JAMES POUNDS v. EDWARD CARR.

(*Queen's Bench.*)

April 17.
 June 3, 6.

DEBT for penalties.—The declaration contained six counts. The first count stated that theretofore, and after the passing of a certain Act of Parliament, made and passed in a session of Parliament held 54 G. 3, entitled, &c.,* a certain suit was depending in a certain Ecclesiastical Court in Ireland, *to wit* the Diocesan Court of Ferns, *to wit* in the Consistory Court of Ferns, *to wit* in the Consistorial Court of Ferns, *to wit* in the Consistory of Ferns, in which suit Caroline Pounds was promovent, and the plaintiff in this suit impugnant, and in said suit no one rightfully or lawfully could, or

to a declaration for penalties the defendant pleaded a prior action pending against him for the same penalties at suit of another informer; the plaintiff replied that the writ of summons and declaration in the former action were sued out and filed by the plaintiff therein by fraud and covin, contrary to the statute. *Held*, that the statute 4 Hen. 7, c. 20, did not apply to the case of a plea of a prior suit pending, but only to cases of judgments recovered, and to bars by final proceedings, and therefore that the replication was not warranted by that statute.

Held also, that such replication was bad at Common Law on special demurrer.

Held also, that the present action being a penal one, the defendant was not, within the 6 Anne, c. 10, entitled to plead double matter.

Barrett v. Johnson (2 Jo. 147) considered.

* 54 G. 3, c. 68, s. 10.—“And be it enacted, that from and after the passing of this Act, in case any person or persons shall, in his or in their own name, or in the name of any other person or persons, make, do, act, exercise or perform any act, matter or thing whatsoever, in any way appertaining or belonging to the office, function or practice of a Proctor, for or in consideration of any gain, fee or reward, or with a view to participate in the benefit to be derived from the office, functions or practice of a Proctor, without being admitted and enrolled, every such person for every such offence shall forfeit and pay the sum of £50, to be sued for and recovered in manner hereinafter mentioned.”

Section 12.—“That all pecuniary forfeitures and penalties, imposed on any person or persons for offences committed against this Act, shall and may be sued for and recovered, in any of his Majesty's Four Courts in the city of Dublin, by action of debt, bill, plaint or information, wherein no essoign, protection, privilege, wager of law, or more than one imparlance shall be allowed, and wherein the plaintiff, if he or she shall recover any penalty or penalties, shall receive the same for his or her own use, and full costs of suit.”

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of right ought to do, in his own name, as Proctor in or of said Ecclesiastical Court, any thing whatsoever in any way appertaining or belonging to the office, functions or practice of a Proctor, or in consideration of any gain, fee or reward, without being admitted and enrolled as a Proctor, *to wit*, of and in said Ecclesiastical Court; of all which the defendant then and there had notice. *Breach*, that the defendant afterwards, *to wit*, &c., in his own name, *to wit* by the name of Edward Carr, jun., as a Proctor of an Ecclesiastical Court in Ireland, *to wit* of the said thereinbefore mentioned Ecclesiastical Court, at &c., and in said suit there, and for and in consideration of gain to him, the defendant in that behalf did a thing appertaining and belonging to said office, functions and practice of a Proctor of said Ecclesiastical Court, that is to say [setting forth a consent, signed by the defendant as Proctor], without his the said defendant being admitted or enrolled as Proctor of said Ecclesiastical Court, contrary to the form of the statute, &c.

The second count alleged that the defendant did the act with a view to participate in the benefit to be derived from the office of a Proctor.

The third and fourth counts charged the defendant with having, as Proctor, and without being admitted to said office of Proctor, signed &c., a discharge in writing, directed to the Sheriff of the county of Wexford, and the governor of the county gaol, requiring them to discharge the plaintiff from custody under a writ *de contumace capiendo*.

The fifth and sixth counts charged him with having in a similar capacity signed and executed a receipt for certain taxed costs.

The defendant pleaded—first, *nil debet*. Secondly, that before the commencement of the suit, *to wit*, on &c., one Henry Carr sued and prosecuted out of the Court of our Lady the Queen, &c., against the defendant a certain writ called a writ of summons, with intent to declare thereupon as thereafter mentioned [setting forth the writ]; that afterwards and before the commencement of this suit, and within four months from the issuing of said writ of summons, and whilst the same was in full force, on &c., at &c., the defendant was duly served with a copy of said writ, with a notice thereon

indorsed according to the course and practice of said Court; that afterwards, on &c., in the Court of our Lady the Queen, came the said Henry Carr by his attorney, and the defendant by his attorney also came according to the exigency of said writ of summons, and thereupon the said Henry Carr filed his declaration, upon and by virtue of the said writ of summons, against the defendant, of a plea of debt for the sum of, &c., in respect of divers penalties of, &c., in that declaration alleged to have been incurred by said defendant for certain offences supposed to have been committed by said defendant, contrary to the form of the statute [setting out the declaration *in hæc verba* similar to that filed in this action], as by said declaration, &c. The plea then averred that the said action was still depending; that the parties and the causes of action were the same, and concluded with a *verification*.

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Fitzgibbon (with him *R. Armstrong*), on behalf of the plaintiff, moved to set aside the rule to plead double matter, upon the ground that the statute of 6 *Anne*, c. 10, s. 4* (corresponding to 4 *Anne*, c. 16, *Eng.*), allowing the pleading double matter, did not extend to any writ, bill, action or information upon a penal statute; and that the defendant might be put to elect which of the pleas he would abide by, and that the other might be expunged: *Heyrick v. Foster* (a).

April 17.

Brewster and *Lynch*, contra.



In the case of *Barrett v. Johnson* (b), in an action similar to the present, several pleas were pleaded without objection. This is an action of debt to recover penalties, but not, strictly speaking, a *qui tam* action. In *Ward v. Snell* (c) the distinction is laid down by

(a) 4 T. R. 701.

(b) 2 Jon. 197.

(c) 1 H. BL 18.

* Section 4 enacts, "That it shall and may be lawful for any defendant or tenant in any action or suit, or for any plaintiff in replevin in any Court of Record, with the leave of the same Court, to plead as many several matters thereto as he shall think necessary for his defence."

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Gould, J.:—"This is not a popular action; it is like an action on "a bond to recover a debt already due; a right of action vests in "the party grieved as soon as the grievance is committed; but it is "otherwise of a common informer, who has no interest until judgment." When an act is made illegal, the party doing it may be prosecuted; but when it is made the subject of a penalty, it is not misdemeanour; here the party may do the act if he pay the penalty.—[CRAMPTON, J. This is a debt growing out of the penalty.—BLACKBURNE, C. J. The statute was to prohibit the act, not to allow the party to do the act by paying the penalty.]—The statute does not extend to a *qui tam* action: *Law, qui tam, v. Crowther (a)*.—[PERRIN, J. I recollect a case in this Court, in which this matter was discussed, and it was held such a form of pleading should not be allowed.—MOORE, J. It is difficult to understand the position, which in fact alters the nature of the action, that if the right be given to the Crown, it is a penalty; but if to a subject, it is not.]—It must be an indictable offence within the proviso in the statute.

R. Armstrong, in reply, cited *Morgan v. Luckup (b)*; *Bartlett v. Vinor (c)*.

BLACKBURNE, C. J.

The Court are of opinion that this case does not come within the terms of the statute of *Anne* authorising the pleading double matter. The statute on which this action rests, 54 *G.* 3, c. 68, is prohibitory as well as enjoining a penalty for the commission of the offence provided against. The defendant therefore must elect on which plea he will proceed.

The defendant having accordingly elected to rely on the second plea, the plaintiff replied thereto, that the said writ of summons in the said plea mentioned was sued out, and the declaration in said

(a) 2 Wils. 21.

(b) 2 Stra. 1044.

(c) Cath. 251.

plea mentioned, and therein stated to have been filed by H. Carr, T. T. 1851. was filed by H. Carr by fraud and covin, contrary to the form of the statute.—*Verification.*

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Special demurrer to this replication, assigning as cause that it did not state any fraud or covin, or any circumstance wherein any fraud or covin existed in the suing out of the writ or filing of the declaration by H. Carr; that the allegations as to fraud and covin were not pleaded with certainty, and that it was impossible to take issue thereon; that no fraud or covin affecting the defendant was shown or alleged; nor was it shown for what reasons the defendant should be liable to two actions for the same penalties; nor were there any circumstances stated to show any consent, agreement or combination between H. Carr and any other person. Joinder in demurrer.

Harris (with him *D. Lynch*), for the demurrer.

This is an action of debt for penalties, and the plea is of a prior action pending against the defendant for the same penalties at suit of another person, and the replication is fraud and covin, contrary to the statute. To that we have demurred, alleging it is a bad replication at Common Law, inasmuch as no circumstances of fraud or covin on the defendant's part are stated, or fraud or collusion alleged. At Common Law fraud and covin would not avoid every act; it must be wrongful in itself; or if right in itself, its effect must be to injure some interest vested in the party who complains of it: 15 *Edw. 4*, fol. 4, plac. 7; *Co. Litt.* p. 357, a; *Wimbish v. Tailbois* (a). A rightful act may be covenous; but it can only be so when done to the prejudice of another. Besides, a popular action, such as this, given by statute to any one who will institute it, does not vest in any one until the action be brought, and then it rests in the first person who brings it: 1 *Hen. 7*, plac. 2. Such was the Common Law when the 4 *Hen. 7*, c. 20, passed.

The replication here is fraud and covin, contrary to the statute; and that statute has been held not to apply in cases where the action is instituted for the same penalties: *Barrett v. Johnson* (b). That

(a) Plow. 54.

(b) 2 Jo. 197.

T. T. 1851. was a case similar to the present, and a replication of fraud and
Queen's Bench covin was there held bad on general demurrer. The word "covin"
 FOUNDS implies that the act must be done with some other persons; and the
 v. replication here does not allege that Carr did the act with any other
 CARR. person.

R. Armstrong (with him *Fitzgibbon*), contra.

In that case of *Barrett v. Johnson* there was no averment that the act was contrary to the statute; and this form of replication is sanctioned in 2 *Chitty on Pleading*, p. 463. If this be a good replication to a plea of judgment recovered, it is a good replication to a plea founded on the statute of *Hen. 7*. What does that statute contemplate? To put an end to any covenous plea or bar, or plea of judgment recovered, and so it gives this form of replication. The plea here is one in bar, viz., plea of another action pending. That could not be pleaded in abatement: *Barnes v. Blackburne* (a); *Bac. Abr. Action, Qui Tam*, D. The statute is to be liberally construed. But it is not necessary to make it covin, that there should be a third person *in esse* to be injured.—[CRAMPTON, J. If there be a judgment recovered by covin there must be two persons parties to the fraud.]—We can only sustain the replication by force of the statute.—[PERRIN, J. How can a judgment in this action, and a decision that the recovery in the former one was fraudulent, affect the plaintiff in the present action? I do not think that there are any words in the statute referring to a pending action; there are the words "such former plaintiff."]—That word "such" refers to the last antecedent, and is distributive. A plea of action pending being a good plea in bar, is within the statute, and means that every thing may be pleaded in bar if done covenously.—[CRAMPTON, J. Might an executor plead that there is an action pending which would exhaust the assets?—]No; but he may confess a judgment even after action brought. Before the statute of *Hen. 7* a plea of a pending action was a good plea in bar,^a and if the first action commenced proceeded to judgment, it could not be pleaded that that judgment was obtained through fraud or covin, because

(a) Say. Rep. 216.

that would be to contradict the record. It was to remedy that manifest abuse the statute of *Hen. 7* passed. In 9 *Coke*, p. 110, *a*, it is laid down that the general averment of covin is sufficient. With usury it would be different; and that distinction is suggested by Lord Ellenborough, C. J., in *Hill v. Montague (a)*:—"Usury is "not like fraud and covin, which usually consist of a multiplicity of "circumstances, and therefore it must be inconvenient to require "them to be particularly set forth." The statute gives the plea where it did not exist at Common Law, and says nothing as to the case where it did exist; and this replication is therefore good at Common Law.

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Lynch replied.

This is not at all a pleading within the statute of *Hen. 7*. The bar spoken of in the statute is the bar set up in a former action. The plea here is good at Common Law, because the public informer, by bringing the action, makes the suit, which before was popular, a private and a personal action. In 11 *Coke*, 66, *a*, in the note it is said:—"For by the suit of the informer commenced, he has made the "popular action his private action, which the King nor any other "can release as to his interest; and the condemnation or acquittal of "the party at his suit is a bar against all others, and against the "King; and yet the King in all these cases, before any action "commenced by an informer, may pardon and release it, and that "shall be a bar against all people." "Fraud and covin" mean not the arrangement between parties themselves, but have reference to the rights of other parties: *Twyne's case (b)*. True, this replication is to be found in *Chitty*, but not to a plea setting up such a case as the present: 3 *Chitty on Pleading*, p. 963. What is the fraud alleged on this replication? Fraud in Henry Carr. But how is the defendant brought into connexion with that fraud? The form of this replication differs from that in *Barrett v. Johnson*.—[PERRIN, J. The title of the statute plainly intimates what the object of the Legislature was in its enactment.]

Cur. ad. vult.

(a) 2 Maul. & Sel. 377.

(b) 3 Coke, 80.

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CRAMPTON, J., delivered judgment.*

This case comes before us on a demurrer to the plaintiff's replication. The declaration is for penalties incurred under the statute of 54 G. 3, c. 68. The defendant pleaded in bar a single plea, viz., a prior action pending against him for the same penalties at the suit of another informer.

The replication is, that the writ of summons in the former suit and the declaration were sued out and filed by the plaintiff therein by fraud and covin, contrary to the statute. To this replication the defendant has demurred, and has stated special causes of demurrer, viz., that no circumstances of the fraud or covin relied on are stated; that no fraud or collusion on the defendant's part is alleged, and that the replication is general, vague and uncertain.

Defendant also relies upon the general ground, that even if the replication were free from formal defects, yet that it furnishes no answer to the defendant's plea; and he cites the case of *Barrett v. Johnson* (a) as a decisive authority in his favour. And it must be admitted that in *Barrett v. Johnson* the Court of Exchequer has ruled that in answer to a plea of a prior suit pending a replication substantially the same as that now before us, but much more full and formal in its frame, was bad, and was bad upon general demurrer. The principle of that decision involves very serious consequences indeed, for it seems to flat the doctrine that although fraud and covin may be replied to a collusive prior judgment, it cannot be replied to a pending prior collusive suit which has not been brought to a conclusion. The effect of this decision would seem to furnish to the defendant in a popular action an easy instrument by which he at all times may defeat the *qui tam* action of a *bonâ fide* informer. He has for that purpose, in the name of a friend, only to anticipate the *bonâ fide* informer by instituting and keeping on foot collusive actions against himself until the period for commencing such popular actions has gone by; for that the plea of a prior pending suit for the same penalties is a good plea in bar at Common Law to a

(a) 2 Jo. 197.

* The CHIEF JUSTICE was indisposed.

popular action, is beyond controversy; it was a good plea before the statute of the 4 *Hen.* 7 was passed. On the other hand the case of *Barrett v. Johnson* is the decision of a Superior Court made by very eminent Judges; and from the judgment in that case no writ of error was brought. That last circumstance may, however, possibly be accounted for by the consideration that the defendant had upon the record another defence, upon which he must at all events have been entitled to judgment, namely, that the action had not been commenced in due time; for though it was a penal action, the defendant had been allowed to plead double matter.

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Under these circumstances I am not sorry that we are enabled to decide the case now before us without being called upon either to affirm or to disaffirm the doctrine laid down in *Barrett v. Johnson*. The present replication is founded upon the supposition that it is warranted by the statute of the 4 *Hen.* 7, c. 20, and therefore concludes with the words "against the statute;" and it is framed accordingly in the very general terms allowed by that statute.

But we are of opinion that the statute of *Hen.* 7 does not apply to the case of a plea of a prior suit pending, but only to cases of judgments recovered, and to bar by final proceedings equivalent to judgments. Whether it was that such a replication was good at Common Law against the defence of a suit pending, though it could not be pleaded to falsify or contradict a solemn judgment, or whether the Legislature intended to confine the replication of fraud and covin merely to cases in which the former collusive suit had come to a final determination, we need not now consider. Whatever was the intention of its framers, the statute does not apply to the case of an undetermined suit. The replication therefore in the present case is not warranted by the statute of *Hen.* 7; and as a replication at Common Law, it is manifestly open to the objections specially stated by the demurrer. The judgment therefore must be for the defendant.

Judgment accordingly.

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JOHN BLUNDEN v. WILLIAM MARSH.

May 12.

To an action on a bill of exchange by indorsee against acceptor, the defendant pleaded the general issue, and a plea that before the promises were made, and the bill accepted, the defendant was discharged as an insolvent debtor, and that before his discharge he filed a schedule, and that the promises were made, and the bill of exchange was accepted, for and in consideration of the debt contracted before the defendant was so discharged, which debt was set out in the schedule, and for no other consideration. The plaintiff replied *de injuriâ*. *Held*, that evidence being given that the bill was a renewal bill, given in consideration of a party withdrawing his opposition to the insolvent's discharge, the defendant was discharged from liability thereupon, and that the replication *de injuriâ* was no answer to such plea.

Semle—The plaintiff should have replied he was indorsee for valuable consideration without notice.

ASSUMPSIT, by the indorsee against the acceptor of a bill of exchange, dated the 22nd day of June 1850, for £10, drawn by one Thomas Anthony, jun.

The declaration contained the common count on the bill and the money counts.

The defendant pleaded non-assumpsit; secondly, *actionem non*; because he says that before the making of the several promises, and the making and accepting of the bill of exchange, the defendant was duly discharged as an insolvent debtor under the provisions of the Act for the Relief of Insolvent Debtors in Ireland, by an order of adjudication of the Insolvent Court; and that before the defendant was discharged he duly filed a schedule, and that the promises in the declaration were, and each of them was, made, and "the said bill of exchange was accepted for and in consideration of a certain debt contracted before the defendant was so discharged as aforesaid, and which debt was duly stated and set forth in the said schedule of the said defendant, and whereupon and in respect of which the said defendant was discharged by the order aforesaid pursuant to the provisions of the said Act, and had become entitled to the benefit of the said Act, and for no other consideration what-ever."—*Verification*.

Similiter to the first plea, and replication *de injuriâ* to the second plea.

At the trial, which took place before the LORD CHIEF JUSTICE, at the Sittings after Hilary Term, the plaintiff proved handwriting, and that Thomas Anthony, jun., indorsed the bill to him for valuable consideration, and thereupon closed his case; and defendant's Counsel then called for a nonsuit, on the ground of a variance in the bill

produced, and that declared on ; but his Lordship having allowed the plaintiff to amend, this ground gave way.

The defendant then read the proceedings in the Insolvent Court, including the schedule, a consent order, and a memorandum, hereinafter stated, both dated the 23rd of March 1850. By the consent order it was admitted that the defendant was duly discharged as an insolvent debtor ; that at the time of his discharge he was indebted to Thomas Anthony, jun., in £10 or thereabouts, which was entered in his schedule ; that he was discharged from that debt, and that the memorandum was signed on the day of his discharge, and previous thereto, and placed in the hands of Thomas Anthony, jun. By the memorandum defendant agreed with Thomas Anthony, jun., in consideration of his withdrawing his opposition to defendant's discharge, to give Thomas Anthony, jun., his acceptance for the debt due to him, which was included in the schedule. It further appeared that a bill was in two days afterwards given pursuant to said memorandum, and that the bill, the subject of the action, was a renewal of the one so given in pursuance of the memorandum. Thereupon the defendant's Counsel submitted the defendant was entitled to a verdict on the second plea ; but the CHIEF JUSTICE declined to give this direction, and told the jury that if they believed the evidence for the plaintiff, he was entitled to a verdict for the amount of the bill produced, reserving to the defendant liberty to enter a nonsuit if he was wrong in his opinion ; and the jury found a verdict accordingly.

A rule *nisi* having been obtained to set aside this verdict, and enter an nonsuit on the ground of misdirection, and because the verdict was contrary to law, and because the defendant was entitled to a verdict on the second plea, cause was now shown by—

D. Lynch (with him *Lawson*).

The question is, does the discharge under the Insolvent Act enure to discharge this instrument in the hands of an innocent indorsee for value ? The bill might be void in the hands of a party to the illegal transaction, but not in the hands of a *bond fide* indorsee for value before the bill was due, without notice of the

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illegality: *Wyat v. Bulmer* (a); there it was held that indorsement being *primâ facie* evidence of a good consideration, the acceptor (except in the cases of usury and gaming) is not entitled to call upon a remote indorser to prove the consideration on which he had the bill, unless he is implicated in and privy to the original transaction. Indorsement is of itself *primâ facie* evidence of a good consideration. In *Byles on Bills*, 6th ed., p. 382, it is said "that a bill or note for a debt, from which the defendant has obtained his discharge, is void, and that, notwithstanding that it was made on some additional and good consideration. But it has been held that an innocent indorsee for value, without notice before maturity of the instrument, may recover on such note." It may, however, be argued that this question is not opened to us on the replication *de injuriâ*; but this plea of insolvency is matter of confession and excuse, and *de injuriâ* is the proper answer: *Scott v. Chappelow* (b). *Humphreys v. O'Connell* (c) was an action by indorsee against acceptor, and the defendant pleaded that it was accepted for a gaming debt, and that the plaintiff before the indorsement to him had notice thereof, and the replication *de injuriâ* was put in and held good on special demurrer: *Boulton v. Coghlan* (d). The plea of insolvency is a statutable plea: *Northam v. Latouche* (e); *Lucas v. Winton* (f).

R. J. Lane and F. W. Darley, contra.

The plea amounts to this, that the party who drew the bill was discharged as an insolvent, and was necessarily discharged from the debt for which the bill was given, and therefore not liable on the bill: *Cockshott v. Bennett* (g); *Jackson v. Dawson* (h); *Wilson v. Kemp* (i); *Rogers v. Kingston* (k). The plaintiff might have replied generally, as provided by the statute, or he might have traversed, or replied any other matter or thing which might show

(a) 2 Esp. 538.

(b) 4 M. & G. 336; S. C. 2 Dowl. N. S. 78.

(c) 7 M. & W. 370; S. C. 9 Dow. 213.

(d) 1 Bing. N. C. 640.

(e) 4 C. & P. 140.

(f) 2 Camp. 443.

(g) 2 T. R. 763.

(h) 4 B. & Ald. 691.

(i) 3 M. & Sel. 595.

(k) 2 Bing. 441.

the defendant was not entitled to the benefit of this Act (3 & 4 Vic. c. 107, s. 82); but the replication *de injuriâ* only puts in issue the matters stated in the plea which have been substantially established by the evidence. Under the words of the statute the bill is void, and the plea of the statute is given generally; and whether the bill was taken for valuable consideration or not, or whether plaintiff had notice of its infirmity, are immaterial, the only issue being whether it was a security for a debt from which defendant was discharged: but if that defence would avail it ought to have been raised by a replication that the party was indorsee for valuable consideration, without notice, so as to enable the defendant, if necessary, to be prepared to meet that case at the trial. Allowing such a defence on the present application would be to take the party by surprise. As to the form of the plea; *Thomas v. Fenton* (a); and as to the replication; *Sayre v. The Earl of Rochford* (b): that case shows that under the replication *de injuriâ* a tender and refusal of bail cannot be given in evidence, but must be replied specially.

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Lawson replied, and cited *Bailey v. Bidwell* (c); *Arbounin v. Sir J. Anderson* (d).

BLACKBURN, C. J.

This action is brought by the plaintiff as indorsee of a bill of exchange, and the defendant has in substance pleaded his discharge under the Insolvent Act. The bill in question was in point of fact a renewal bill, given for a debt contracted before the defendant was discharged as an insolvent. There is but the one debt, and the action is instituted to recover that very debt, from which the discharge under the Insolvent Act exonerated the defendant. The replication *de injuriâ* is an answer only to the matter stated in the plea, and if not having notice of the infirmity of the bill was a bar, the plaintiff should have specially replied that fact. There must therefore be a nonsuit entered.

(a) 5 Dowl. & Low. 28.

(b) 2 Wm. Blac. 1164.

(c) 13 M. & W. 73.

(d) 1 Q. B. 498.

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Lessee BLACKWELL v. HALE.*

(Error from the Court of Queen's Bench.)

May 29.

R. B. by his will limited an estate to J. B. and S. B. for their lives as tenants in common, with remainder, on the death of either, to the other for life: the will then contained a devise to trustees to preserve contingent remainders, and after the death of the survivor of them the said J. B. and S. B. the devise was "to permit and suffer the lawful issue male of said J. B. and S. B., or the lawful issue male of one of them, in case the other shall have no issue at the time of his decease, to take and receive the rents, issues and profits of the said premises share and share alike during their respective natural lives; and in case of no issue male of either of them living at the death of the survivor of them, then to permit the issue female of them and each of them, during their natural lives, to receive the rents, issues and profits thereof share and share alike."

The will then contained a power enabling J. B. and S. B., or the survivor of them, or the heirs male of such survivor, to make leases of the premises, and then followed these words:—"provided and in case the said J. B. and S. B. shall both die without leaving any issue male or female of them or either of them living at the time of the death of the survivor of them, then and in such case I devise the same to D. B. and B. S. share and share alike for ever."

Held, that the words "issue male" meant "heirs male," and that S. B. took an estate tail under the will.

(a) See 12 Ir. Law Rep. 531.*

* *Absentibus* DOHERTY, C. J., TORRENS, J., and RICHARDS, B.

“uses, intents and purposes following—that is to say, in the first
 “place, on the special trust that the said John Ball and William
 “Johnson, or the survivor of them, or the heirs, executors and
 “administrators of such survivor, *shall and will permit and suffer*
 “*my brother John Blackwell, and my natural son Samuel Black-*
 “*well, during their natural lives, to take and receive the rents, issues*
 “*and profits of the said above mentioned premises in the county of*
 “*Louth, and in the county of the town of Drogheda, to their own*
 “*sole and separate use, share and share alike; and after the death*
 “*of either of them the said John or Samuel, then to permit and*
 “*suffer the survivor of them to receive the entire rents, issues and*
 “*profits thereof during the natural life of such survivor.* I also
 “hereby further devise, will and bequeath the said above-mentioned
 “tenements and premises in the county of Louth and in the county
 “of the town of Drogheda, and every part thereof, in as full and
 “ample a manner as I have before devised same, and in the lifetimes
 “of the said John and Samuel, to the said John Ball and William
 “Johnson, and to the survivor of them, and to the heirs, executors
 “and administrators of such survivor, to preserve the contingent
 “estates hereinafter limited from being defeated or destroyed during
 “the natural lives of the said John and Samuel, and the survivor of
 “them—that is to say, upon this further special trust, immediately
 “after the death of the survivor of them the said John and Samuel.
 “*to permit and suffer the lawful issue male of my said brother John*
 “*and of my said reputed son Samuel, or the lawful issue male of*
 “*one of them, in case the other shall have no issue at the time of*
 “*his death, to take and receive the entire rents, issues and profits*
 “*of the said premises, share and share alike during their respective*
 “*natural lives; and in case of no issue male of either of them living*
 “*at the death of the survivor of them, then to permit and suffer the*
 “*issue female of them and of each of them during their natural lives*
 “*to receive the rents, issues and profits thereof, share and share*
 “*alike:* and my further will is, that my said trustees shall permit
 “and suffer the said John Blackwell and Samuel Blackwell, or the
 “survivor of them, or the heirs male of such survivor, to make and
 “execute a lease or leases of any part of the premises before men-

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"tioned, as often as the same or any part thereof shall be out of
 "lease, for any term not exceeding sixty-one years, at the best and
 "most improved rent, without taking any fine for same; but pro-
 "vided and in case they the said John Blackwell and Samuel
 "Blackwell shall both die without leaving any issue male or female
 "of them or either of them living at the time of the death of the
 "survivor of them, then and in such case I will, devise and bequeath,
 "and I hereby direct my said trustees, or the survivor of them as
 "aforesaid, to permit and suffer my nephew Daniel Blackwell and
 "the eldest son of my nephew Brabazon Smith, to have, receive and
 "enjoy, and to hold and possess all the said towna, lands, tenements
 "and premises before mentioned in the county of Louth, and in the
 "county of the town of Drogheda, for their own sole use and behoof,
 "share and share alike for ever. And whereas I am seised and pos-
 "sessed of a freehold lease for lives renewable for ever in the
 "county of Monaghan, and also of two chattel leases in the county
 "of the town of Drogheda, now in the possession of Nicholas Walsh,
 "James Bellew and Phillip Reilly, I will, devise and bequeath the
 "same and every part thereof to the said John Blackwell and
 "Samuel Blackwell, and to the survivor of them, and to the heirs
 "of such survivor for ever."

The will contained some bequests of personalty, not material to the question before the Court.

The testator died in 1807, and Samuel Blackwell, who had been abroad at the time of testator's decease, returned to Ireland in 1820. John Blackwell died in 1834, never having had any lawful issue; and Daniel Blackwell, by his will, dated the 7th of August 1838, devised all the property bequeathed to him by the testator to Esther Blackwell (the lessor of the plaintiff) for her life, and died before the 1st of January 1848. By indenture of the 29th of September 1841, Samuel Blackwell conveyed the premises devised to him to Joseph Booth in fee, in order to bar the estate tail; and such deed was duly enrolled; and by another deed of the 30th of September 1841, Samuel Blackwell, for a consideration of £100, purported to convey the premises to the defendant Anne Hale. Samuel Blackwell died in 1847 without issue, he and John Blackwell having been

in possession of the rents and profits of the premises under the will of Richardson Blackwell until the death of John in 1834, when Samuel remained in sole possession until the execution of the deed of the 30th of September 1841. The lessor of the plaintiff claimed to be entitled to an undivided moiety of the premises in the declaration described.

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 HALE.

Molyneux and *Gilmore* (with them *Holmes*) were heard on behalf of the plaintiffs in error, and—

Filgate and *Tombs* (with them *Joy*), for the defendants.*

Cur. ad. vult.

BLACKBURN, C. J.

In this case the Court is of opinion that the judgment of the Court of Queen's Bench should be affirmed. BARON PENNEFATHER, who is unable to attend, desires me to say that he concurs with the other Members of the Court, though his mind is not free from doubt. June 13.

The plaintiff claims under Samuel Blackwell, and the defendant under Daniel Blackwell, devisees in the will of Richardson Blackwell. The clauses of the will, on the construction of which the right of these parties to the estate, the subject of this ejectment, depends, gives estates for life to John and Samuel Blackwell and to the survivor of them, followed by a devise to trustees to preserve contingent remainders; and after the death of the survivor are the words:—"To permit and suffer the lawful issue male of my said brother John and reputed son Samuel, or the lawful issue male of one of them, in case the other shall have no issue at the time of his decease, to take the rents, issues and profits of the said premises share and share alike during their respective natural lives; and in case of no issue male of either of them living at the death of the survivor of them, to permit the issue female of them and each of them during their natural lives to receive the rents, issues and profits

* For the arguments and cases cited, see 12 Ir. Law Rep. 535.

T. T. 1850. "thereof share and share alike." There is then a power to John and Samuel or the survivor of them, or the heirs male of such survivor, to make leases of the premises; then follows a clause, that in case the said John and Samuel shall both die without leaving any issue male or female of them or either of them living at the time of the death of the survivor of them, then in such case he devises the same to Daniel Blackwell and Brabazon Smith share and share alike for ever.

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In this, and indeed in most cases of wills in which the word "issue" occurs, difficulties of construction arise from the use of a term which admits of different significations. It may mean issue indefinitely; or sons, grandsons, or a particular class or classes of descendants; the former is its proper and primary sense, it is *nomen collectivum*, and embraces the whole line of descendants, unless the testator use it, as he may, in a qualified or restricted sense.

The question here is, in which sense did he use it? The devises are to the *lawful issue male and issue female* of John and Samuel, to whom and the survivor of them he gave the estate for their lives. He does not add a word to limit these devises to any class of descendants; it comprises sons, grandsons, great-grandsons, daughters, and their female descendants; in fact whole lines of posterity, not one member of which can we say it was intended to exclude; for the testator has not said so himself. There is, in fact, nothing to limit or restrict the meaning of the word as it is used in this will, except the words in the first clause, which would make the issue male in the first and the issue female in the second devise take as tenants in common, and for their respective lives. On their effect as qualifying or restricting the sense of the word "issue," I shall remark hereafter. There are, however, other passages in the will which support the primary construction of the word "issue." The leasing power is given to the tenants for life or the heirs male of the survivor of them; this, though not given to as many heirs of descendants as were to enjoy the estate, is at all events given to one of their heirs *in perpetuum*, and is given as incident to an estate which was already devised to them. This is a plain exposition of

the word "issue," and of the estate they are intended the testator had said:—"By the issue male, to whom the estate, I mean heirs male, who are to devise it." The concluding limitation, though it may be an estate tail by implication, as it is not to take place on the definite failure of issue, is not inconsistent with such a construction if warranted by the previous passages of the will. It means no more than this, that if the estate already devised were to terminate before or on the occurrence of a particular event, the lands should in that event go to Daniel Blackwell. Indeed it may be fairly argued that the words "without leaving any issue male or female" mean that an indefinite failure of issue was the event he contemplated, and that the devise over was to take effect only on the contingent event of the failure of such issue at the time of the death of John and Samuel Blackwell. In reference to this devise over, it is important to remark that if there were any issue of John and Samuel living at their deaths, but who died afterwards, the devise over would not take effect, and if these children afterwards died the estate would be undisposed of.

I have now referred to the parts and phrases of this will which seem to me to indicate a distinct intimation that the heirs of descendants of John and Samuel Blackwell, which the will describes, should take in succession and for ever. Taking this to be their meaning, we have to inquire how it can be effectuated, and to that end how is the succession to the estate to take place? It is manifest that John and Samuel are to have estates for their lives, and that the survivor is to have the whole for his life. As John and Samuel have both died without issue, it is plain that in order to effectuate the general intent which we have ascertained, we must hold the word "issue" to mean "heirs of his body;" and that by the rule in *Shelley's case* the survivor took an estate tail. It is not, as the event has happened, necessary to say whether, if there had been issue, estates in remainder for their lives might not have been interposed between the estate for life of John and Samuel, and the estate in remainder, which, to effectuate the general intent, they must take by implication. My impression, however, is, that such a construction would have been

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T. T. 1850. warranted by the terms of this devise, and by the case of *Parr*
Exch. Cham. v. *Swindels* (a), to which my Brother MOORE has referred me.
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Having now considered the language of these devises, it remains to decide, if any, and what, effect should be given to the clauses which limit estates for life to the issue, and provide that they should take as tenants in common. I consider it to be now settled by authority that, however clearly expressed either intention may be, if it cannot be effectuated without frustrating and defeating the general intention of transmitting the estate in a course of unlimited succession, it must be disregarded, and can have no operation. The case of *Jesson v. Wright* (b) decides that words of limitation cannot be restricted or controlled by the plainest intent that the estate is to be enjoyed by issue or heirs for ever as tenants in common. Lord Eldon, in coming to this decision, regrets that it is necessary, because, as he adds, when we thus enforce a paramount intention, we enable the first taker to destroy both the particular and general intent; but it is more important to maintain the rules of law than to provide against the hardships of particular cases.

As to the devise that the issue shall enjoy for their lives, when it comes in conflict with the intention to give it to them indefinitely, the cases that have been cited demonstrate that as it cannot be effectuated without sacrificing the paramount intent, the latter must prevail. On this *Doe v. Gallini* (c), and *Murthwaite v. Jenkinson* (c), are clear authorities; for though the facts of these cases are in some respects different from that before us, they recognise and apply established rules of construction. I would here refer, as in my judgment in the Court below, to the observations in Sir E. Sugden's work on the *Law of Property*, when referring to the case of *Doe v. Gallini*, in a case in which *Murthwaite v. Jenkinson* was slightly referred to; it was said to be an example of the proper construction of the word "issue," which was considered as a word of limitation, embracing all their descendants, and in which the inconsistent intent, that all their descendants should take for life, formed no reason why they should not take at all, and why the word should not be con-

(a) 4 Russ. 283.

(b) 2 Bli. 1.

(c) 5 B. & Ad. 540.

(d) 2 B. & C. 357.

strued in its proper and legal sense. I would, in conclusion, refer to the words of *Lord Ellenborough*, in *Doe d. Cottore v. Stenlake* (a), to show how little weight should be given to expressions of intention which the law cannot effectuate. He says the words during their lives, after the devise to the daughter and her heirs, is merely the expression of a man ignorant of the manner of describing how the parties whom he meant to benefit should enjoy the property; for whatever estate of inheritance the heirs of his daughter might take, they would in fact only enjoy the benefit of it for their lives. For these reasons the judgment of the Queen's Bench should, I think, be affirmed.

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Judgment affirmed.

(a) 12 East, 515.

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NOTT v. FITZGIBBON.

May 12.
 June 14.

(*Queen's Bench.*)

The words "such actions," in 3 & 4 Vic. c. 108, s. 175, refer to actions of assumpsit, covenant, debt, trespass for taking goods, and trover, and therefore an action of trespass for false imprisonment brought in the Borough Court of Cork is not within the provisions of that section, and proceedings had thereon are not removable by *certiorari*.

CHATTERTON, on behalf of the plaintiff, applied that the writ of *certiorari* which issued in this cause be quashed, with costs, and that a *procedendo* do issue, and that the proceedings be remitted to the Court below, on the ground that the writ of *certiorari* issued irregularly and improvidently, and in contravention of the Act of 3 & 4 Vic. c. 108, and for the costs of the motion.

The writ of *certiorari* had issued on the 13th of February, directed to the Recorder of the Borough of Cork, to certify a plaint before him, levied or affirmed against William Fitzgibbon, at the suit of James Nott, of a plea of trespass of all attachments thereupon founded; and in pursuance of that writ the Recorder returned the several documents. The declaration filed in the Borough Court was against William Fitzgibbon, to answer James Nott of a plea of trespass, and contained three counts.

The first count alleged that the defendant, within the jurisdiction, &c., seized and laid hold of the plaintiff, and with great force and violence pulled and dragged him about, and gave and struck him a great many blows and strokes, and also forcibly and violently pulled and dragged the plaintiff from and out of a certain building, &c., and obliged him to go along divers streets in said borough to a certain police-office, which, &c., and then and there, within the jurisdiction, &c., imprisoned the plaintiff, and kept and detained him in prison there without any reasonable or probable cause for a long space of time, to wit four hours, contrary to the laws and customs, &c.; whereby he the plaintiff was then and there not only greatly hurt, bruised and wounded, but also then and there, and within the jurisdiction aforesaid, greatly exposed and injured in his credit and circumstances, to wit, at &c.

The second count set out another assault and imprisonment; T. T. 1851.
and the third count charged another beating and ill-treating. *Queen's Bench.*

The damages were laid at £50.

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To this declaration the defendant pleaded not guilty, and FITZGIBBON
thereupon, the cause being at issue, he applied for the writ of
certiorari.

Chatterton.

This action is within the terms of 3 & 4 Vic. c. 108, s. 175, which enacts, "That in every borough to which her Majesty shall have
"granted, or in which there shall continue to be, a separate Court of
"Sessions of the Peace, or a Court of Record for the trial of civil
"actions as aforesaid, there shall be holden or continue to be holden
"a Court of Record for the trial of civil actions; and the Recorder
"of such borough shall be the sole Judge of such Court, and in all
"cases where by charter or custom there is or ought to be holden
"such a Court of Record, shall have jurisdiction to hold and con-
"tinue such Court at such times and places, and with such rules
"and practice, and with the same powers and jurisdiction as belonged
"to the said Court at the time of the passing of this Act; and in
"every case in which such Court had not, before the passing of this
"Act, authority to try, in manner hereinafter provided for, such
"actions as are hereinafter mentioned, such Recorder shall have
"authority to try, in a summary way as hereinafter provided, actions
"of assumpsit, covenant and debt, whether the debt be by specialty,
"or on simple contract, and all actions of trespass or trover for
"taking goods and chattels, provided the sum or damages sought
"to be recovered shall not exceed £20; and either the cause of
"action shall have accrued within such borough, or the defendant,
"or one of the defendants, shall be resident therein; and also all
"actions of ejectment between landlord and tenant, wherein the
"annual rent of the premises of which possession is sought to be
"recovered shall not exceed £20; and also to try, according to the
"course of the Common Law, actions of assumpsit, covenant and
"debt, whether the debt be by specialty or simple contract, and all
"actions of trespass or trover for taking goods and chattels, pro-

T. T 1851. "vided the sum or damages sought to be recovered shall not exceed
Queen's Bench. "£50, and the cause of action shall have accrued within such
 NOTT "borough; and such actions shall not be removed or removable to
 v. "any of her Majesty's Superior Courts by writ of *certiorari*, or any
 FITZGIBBON "other process, save writ of error after judgment, where the pro-
 "ceeding is according to the course of the Common Law," &c.
 What is meant by "such actions?" They must mean either the
 actions next before mentioned, that is, actions of *assumpsit*, &c.,
 which by the preceding clause Recorders are given the power to
 try, or else the actions mentioned in the commencement of the
 section, that is all civil actions, whether the power to try them is
 continued or confirmed by the Act. The words, "where the pro-
 ceeding is according to the course of Common Law," do not afford
 any argument upon the question, as they are meant merely to dis-
 tinguish these actions from proceedings by civil-bill.

That this is the meaning of the words, is confirmed by sections
 182 and 183. "Such actions" cannot mean those next before men-
 tioned, that is, actions for sums under £50, when the jurisdiction is
 confined by this Act; for the case of *Sullivan v. Burke* (a) expressly
 rules that the clause in question applies to actions in the Record
 Court of Cork, the jurisdiction of which was created by charter,
 and is unlimited, and was continued, and not created, by the Act.
 Besides, it would be unnecessary to confer the privilege of exemption
 from removal of actions in Courts for the first time created by
 the Act in comparatively insignificant towns, and to withhold it
 from the old established Record Courts, presided over by Judges of
 experience. There is nothing in the section to restrict the exemp-
 tion to the newly created jurisdiction; for by referring the word
 "such" to the civil actions first mentioned, that is actions in the ex-
 isting Courts, whose jurisdiction is continued by the Act, and also
 in the newly-created Courts, on whom a limited jurisdiction is con-
 ferred, no such inconsistency will exist. No mischief can result from
 this, as the whole proceedings may be removed to the Superior
 Courts by writ of error after judgment, where any errors of law can
 be corrected, and the facts will be tried below by jurors of the very
 same class as those returned on the Assizes panel.

(a) 10 Ir. Law Rep. 204.

There is no such class contemplated by the section as a class limited to £50 in the already existing jurisdictions; there is no distinction drawn, except between actions already triable according to the existing jurisdiction of the existing Courts and those for the trial of which a new and limited jurisdiction is created by this section. "Such actions" must therefore mean either one or other of these two classes, and it cannot mean the latter, and must therefore extend to all civil actions in the Record Courts.

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Copinger and J. D. Fitzgerald, contra.

There must be plain and express words in a statute to deprive a party of his right to have proceedings removed by *certiorari*. The effect of that 175th section is but to withdraw that right in the cases there enumerated, and to destroy the old jurisdiction of Borough Courts in certain actions and for certain amounts. It in fact re-creates certain jurisdictions. The 163rd section provides for the appointment of Recorders in every borough except the city of Dublin, if the Council of such borough shall be desirous of having a separate Court of Quarter Sessions of the Peace, or a Court of Record for the trial of civil actions; and the evident intent of that provision was to sweep away all existing jurisdictions. The words "such actions" in the 175th section apply to all actions within the confined limits, whether created by new jurisdiction or existing under the old jurisdiction. *Sullivan v. Burke* was within the prescribed limits.—[MOORE, J. But the Legislature may have thought it advisable to enact that the judgment of an Inferior Court should be final.] *Sullivan v. Burke* was an action of assumpsit, and was not an action according to the course of the Common Law. The Common Law proceeding was by attachment of the goods—a very different mode of procedure. But this action of trespass for false imprisonment is not at all within that 175th section; for "such actions" therein mean assumpsit, covenant and debt, and actions of trespass or trover for taking goods and chattels, and it does not include either trespass for false imprisonment, or actions on the case.

Chatterton replied.

Cur ad. vult.

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BLACKBURN, C. J.

This case comes before the Court on an application for a writ of *certiorari* to remove certain proceedings from the Borough Court of Cork. The declaration in the Inferior Court was in trespass for false imprisonment and for a sum of £50, and the simple question raised on the motion was, whether this action so brought in the Recorder's Court, founded on charter, could be removed by *certiorari*? it being argued by Mr. *Chatterton* that the 175th section of the Municipal Act took away the right to have such writ of *certiorari* issued. We are clearly of opinion that the right is not withdrawn by the operation of the statute, and that the words "such actions" in the section refer to the cases previously enumerated in it. We cannot therefore direct a *procedendo* to issue.

JACKSON v. MERCER.*

June 3.

To an action of trespass, *quare clausum fregit*, and cutting and carrying away growing crops, and *de bonis asportatis*.
quare clausum fregit, the defendant pleaded the recovery of a judgment against the plaintiff and another, and the issuing of a *fi. fa.* on foot thereof, and justified under this *fi. fa.*
 The plaintiff replied that by an order of the Insolvent Debtors' Court the plaintiff then being an insolvent debtor in custody, and a prisoner in the gaol of, &c., was duly discharged according to 3 & 4 Vic. c. 107, of and from the judgment debt and damages in the plea mentioned, which order and discharge still remained in full force.—*Verification.* *Held*, on special demurrer, that the replication was bad for not showing how the plaintiff was discharged from the judgment, or how he was entitled to relief under the Insolvent Debtors' Act, or that he had taken the proper steps to entitle him to be discharged. *Quære* is such action maintainable?

* *Absentibus* BLACKBURN, C. J., and MOORE, J.

who thereupon, and before the return thereof, together with the defendant as his servant, entered the close in which, &c., and took in execution the said hay and corn, and for the purpose of seizing and taking in execution the goods and chattels of the plaintiff in the second count mentioned, did peaceably and quietly seize and take in execution the last mentioned goods, &c.; the said seizure being for the purpose of levying, and the Sheriff and the defendant, by his command, did thereby levy £45, part and parcel of the debt and damages aforesaid. *Quæ est eadem*, and soforth.

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Replication—That on the 29th of October 1845, to wit at Downpatrick, in the county of Down, by a certain order made by the Court for the Relief of Insolvent Debtors in Ireland, held at, &c., the plaintiff then being an insolvent debtor in custody, and a prisoner in the gaol of Downpatrick aforesaid, in the county aforesaid, was duly discharged according to the 3 & 4 Vic. c. 107, of and from the said judgment debt and damages in said plea mentioned, which said order and discharge still remained in full force.—*Verification*.

Special demurrer to this replication, assigning as cause that it did not show how or in what manner the plaintiff was discharged from the judgment, or that the plaintiff was entitled to relief under said Act of Parliament, or that he had taken the proper steps to entitle him to his discharge.

Head (with him *T. O'Hagan*), in support of the demurrer.

This replication is too general, not specifying the various steps taken by the plaintiff to entitle him to his discharge as an insolvent debtor. The 82nd section of 3 & 4 Vic. c. 107 gives a short form of pleading a discharge under the Insolvent Act, but that form only applies to a plea by the defendant; it does not enable the plaintiff to reply in this general form: *Francis v. Dodsworth* (a).

A ground of general demurrer was about being opened, to the effect that the action should have been in case, not in trespass, and *Ewart v. Jones* (b) was cited; but the Court directed that the argument should proceed only on the special ground.

(a) 4 C. B. 202.
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(b) 14 M. & W. 774.
 79 L

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T. K. Lowry, contra.

This form of pleading is warranted by the statute. *Francis v. Dodsworth* does not apply, it was not a decision under an analogous Act. The Bankrupt Act gives an equally general plea where the party has obtained his certificate: *Pitt v. Chappelow* (a). There a plea of bankruptcy being pleaded, it was held that the plea ought, even if the defendant could set up such a defence, to have set forth fully all the proceedings in the bankruptcy.—[CRAMPTON, J. The statute clearly will not support such a replication as this; you must show that it is good at Common Law. The statute contemplates only the case of an action brought against a party discharged under it, but not one brought by him.]—At Common Law the replication would be good: *Tucker v. Webster* (b). It was there held that a plea of the plaintiff's discharge under the Insolvent Debtors' Act ought to aver that the vesting order was made before the commencement of the suit. But such a plea need not allege that the petition was not dismissed or that the vesting order is still in force, nor that the petition was filed and the vesting order made after the statute 1 & 2 Vic. c. 110 (the English Insolvent Act) came into operation.—[CRAMPTON, J. If there be a good plea at Common Law, surely the averment of the plaintiff's discharge alone was insufficient.]—It has never been decided that it is necessary to repeat all matters connected with the obtaining of the discharge: *Brangan v. Gorges* (c); *Stephens v. M'Farland* (d); *Gillon v. Deare* (e).

O'Hagan, in reply, was not called on.

CRAMPTON, J.

This replication is clearly bad, on the grounds specially assigned. It is not a pleading authorised by the statute, neither can it be sustained at Common Law, and not having set out these matters by which a discharge was made effectual under the Insolvent Act—

The demurrer must be allowed.

(a) 8 M. & W. 616.

(b) 10 M. & W. 371.

(c) 7 Ir. Eq. Rep. 295.

(d) 8 Ir. Eq. Rep. 402.

(e) 2 C. B. 309.

E. T. 1851.
Common Pleas.

SMITH v. WALDRON.

(*Common Pleas.*)

May 8.

ROBINSON moved that the rule entered by the defendant under the 135th General Order of the 23rd of December 1850 might be set aside for irregularity, on the ground that there was no affidavit filed, as required by the 135th General Order, before the entry of the rule, and that the case was not within those intended to be provided for by that Order.

This was a *scire facias* on a judgment of Michaelmas Term 1851, to which the defendant pleaded a discharge under the Insolvent Acts, on which issue was joined. On the 17th of April 1851 the plaintiff served notice of trial for the 24th of the same month in the Consolidated Court of Nisi Prius. On the case being called on, Counsel for both parties being present, the defendant's Counsel objected to the case being tried by that Court, on the ground that it was not one of the cases which could be tried by that Court under the 110th General Order, and the cause was accordingly struck out. On the 28th of April the defendant entered the rule in question, which professed to have been made "on reading an affidavit," and which was served on the 1st of May. On the 29th of April the plaintiff served notice of trial for the sittings after Easter Term 1851, and on the 1st of May the defendant served the plaintiff with a notice, apprising him of the entry of the rule, and a consent to withdraw the notice of trial.

For the plaintiff it was insisted that, as it was admitted that the Court had not jurisdiction to try the case in question, it could not be said that the plaintiff had failed to proceed to trial, in pursuance of his notice, inasmuch as the Court refused to entertain the case at all; that if a process be brought in the Civil Bill Court for a case beyond its jurisdiction, it is dismissed without prejudice and without

A rule entered pursuant to the 135th General Order is irregular, if the affidavit of the facts has not been filed, previous to the entry of the rule. The plaintiff having served notice of trial, before the Consolidated Court of Nisi Prius, in a case which that Court was not authorised to try, and which was struck out by the Judge on that ground.

Semble— The defendant was entitled to enter a rule under the 135th General Order, that the plaintiff should pay the costs of such notice of trial, and that the proceedings be stayed, the plaintiff not having proceeded to trial in pursuance of his notice.

E. T. 1851. costs; and on a plea to the jurisdiction, if found for the defendant a *cassetur breve* would be entered; that a consent on the part of the defendant would have removed the objection: *Cook v. Smith* (a);
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 WALDRON. *Sleeman v. The Governor and Company of the Copper Miners* (b):
 that the rule was also irregular, inasmuch as the affidavit had not been filed on which the rule was professed to be founded: 2 *Ferguson's Practice*, p. 1179; *Anonymous* (c).—[MONAHAN, C. J. I am informed that the practice in this Court is to enter the rule on the production of the affidavit, which is then returned to the party producing it, with directions to him to file it.]—The following authority was cited: *Hodges v. Toplis* (d).

Macdonogh and Ferguson, contra.

On production of the record to the Registrar he refused to receive it, on the ground that it was not a case such as the Court could try; but the plaintiff's attorney produced Counsel's certificate, and insisted that it could. He cannot now allege that he has not failed in proceeding to trial. The 135th General Order does not require the affidavit to be filed before the entry of the rule. Where it was intended that that should be done, it has been clearly expressed, as in the 153rd General Order; and the 198th General Order provides the same as to affidavits to be used on motions. The affidavit may be directed to be filed *nunc pro tunc*: *Lessee Colthurst v. Haynes* (e).—[MONAHAN, C. J. In that case the affidavit was not used for any act of the Court, but as a species of evidence.]

Robinson, in reply.

MONAHAN, C. J.

We think the rule in the present case must be set aside, without prejudice to the defendant entering another rule in the regular manner. We do not think that we could sanction such a practice as that a party should enter a rule professing to be founded on an

(a) 1 Dowl. N. S. 861.

(b) 5 D. & L. 451.

(c) 2 Law Rec. O. S. 468.

(d) 15 Law Jour. N. S., C. P. 195.

(e) 2 Fox & Smith, 357.

affidavit which at the time was not on the files of the Court. We abstain from deciding the other portion of the case, although we are of opinion that the present is a case which falls within the 135th General Order, and that it is not competent for a plaintiff who has put the opposite party to the expense of appearing on the trial, to allege that this is not a case within that Order. The rule must therefore be set aside; but considering the fact that the affidavit, though not filed, was sworn, and that the defendant was led into his mistake by what has hitherto been the practice of the officers of the Court, we shall set aside the order without costs.

Rule set aside without costs; and the plaintiff undertaking to pay the defendant the costs of the former notice of trial when taxed and ascertained, no new rule to be entered to stop the plaintiff.

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Common Pleas.

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EYRE v. HALLANAN.

May 13.

CHATTERTON, with whom was *Lynch*, moved on behalf of the defendant Mary Hallanan that the judgment by default, marked on the 10th of March 1851, and the subsequent proceedings in this cause, be set aside, and that the defendant might be restrained from issuing any *habere* founded on the said proceedings, on the ground that the judgment marked by the plaintiff against the defendant, as an interlocutory judgment, was not founded on any pleading to warrant it, and was marked contrary to the provisions of 13 & 14 *Vic. c. 18*, and inasmuch as the summary of the proceedings delivered by the plaintiff's attorney was not a correct recital of the said proceedings, and did not state correctly the pleadings in the action. It appeared that the writ of summons in ejectment had been served upon several persons, including amongst others Mary Hallanan and William Hallanan. William Hallanan alone entered an appearance

The declaration in ejectment, under 13 *Vic. c. 18*, should include the names of all persons served with the writ of summons. If an interlocutory judgment be marked against a defendant for whom a parliamentary appearance has been entered, but who has not been included in the declaration, such judgment is irregular and will be set aside.

E. T. 1851. and took defence, and a parliamentary appearance was subsequently
Common Pleas. entered for the other defendants, including Mary Hallanan. The
 EYRE plaintiff then declared against William Hallanan, stating "that he
 v. wrongfully assumed the possession" of the lands in question, and
 HALLANAN. marked interlocutory judgment against the other defendants, who
 neglected to appear. The case was tried against William Hallanan
 at the Spring Assizes 1851, for the county of Cork, when a verdict
 was obtained for the plaintiff. Mary Hallanan afterwards set aside
 the parliamentary appearance, and appeared by the same attorney
 who had previously appeared for William Hallanan.

J. D. Fitzgerald and Longfield, for the plaintiff.

The plaintiff's proceedings are regular, within the 17th section of the Process and Practice Act. That section enacts, "That if any defendant in any such action of ejectment shall not appear in due time, according to the exigency of the writ of summons, upon the service thereof, it shall be lawful for the plaintiff to enter an appearance for such defendant, according to the course therein provided with reference to personal actions generally; and if there shall be several defendants in any such action who shall not appear as aforesaid, the plaintiff shall not enter several appearances for them; but it shall be lawful for him to enter one appearance, including all such defaulting defendants, and which appearance shall be deemed to be an appearance for all the said defendants, severally as well as jointly, and the plaintiff shall not file several declarations against such defendants so defaulting, but shall file one declaration, *which shall be applicable to all such defendants* jointly and severally, as well as to all defendants who shall have appeared." The question turns upon the construction which the Court will give to the words *shall be applicable*; and the most natural construction seems to be that the principal defendant is to represent all others, and that a declaration against him is to have the same effect as if all the other defendants were included. This seems the only way in which the provisions of this section and those of the 15th can be made to agree, as by that section the writ of summons is to be directed to the immediate tenant *or* any other

tenant in possession. The Court will not aid the defendant to set aside a judgment where it appears that the party at whose instance the present motion is made was fully aware of all the proceedings. At most the defendant could only set aside the judgment by default against Mary Hallanan, and not the judgment on the *postea*, and by his present notice he seeks more than he can be entitled to. The Court would allow us to amend *nunc pro tunc*: *Ferguson's Practice*, p. 232; *Shaw v. Williamson* (a).

E. T. 1851.
Common Pleas.
 EYRE
 v.
 HALLANAN.

MONAHAN, C. J.

In this case we do not think that the section of the statute admits of the construction which the plaintiff's Counsel have attempted to put on it. We are of opinion that the names of all the defendants who have been served must be included in the declaration; and we think that the notice of motion by the defendant in this case must be taken to mean that no execution shall issue on the judgment so far as that judgment is erroneous and invalid, which as against Mary Hallanan we think it is. It is not necessary for us to decide whether the judgment is valid against William Hallanan, or whether an *habere* can be executed against him.

BALL, J., and JACKSON, J., concurred.

Judgment by default, and subsequent proceedings set aside, the plaintiff to pay to the defendant Mary Hallanan the costs of the motion.

(a) Batty, 493.

T. T. 1851.
Common Pleas.

PARKE v. PARKE.

June 2.

Where a defendant entered a rule for *non pros.*, and the plaintiff obtained a rule to declare under the 50th General Order on payment of one pound costs, which the defendant accepted, held, that the latter had waived his right to obtain security for costs.

BLAKENEY, on behalf of the defendant, moved that the plaintiff should give security for costs, on the ground that the plaintiff resided out of the jurisdiction, and that in the meantime all further proceedings in the action might be stayed.

The facts of the case were as follow :—The defendant entered an appearance to the writ of summons on the 3rd of January 1850, and no declaration having been filed, on the 1st of May 1850 entered and served a rule for *non pros.* On the 8th of May 1850 the plaintiff entered the rule to declare within a fortnight under the 50th General Order, paying the defendant one pound for the costs incurred by him. On the 23rd of May 1850 the declaration was filed, and on the 29th of the same month notice of the present motion served.

Concannon, for the plaintiff.

The defendant has waived his right to obtain security for costs by entering the rule for *non pros.*, and accepting £1 costs, as the terms on which the plaintiff should be permitted to declare. If a defendant serves a notice requiring from the plaintiff security for costs, and that the proceedings be stayed, he cannot obtain a rule for judgment in case of a nonsuit.

Blakeney, in reply, insisted that the defendant's right to obtain security for costs could not be waived unless by a plea, and cited *Clarke v. Dickson* (a).

MONAHAN, C. J.

This motion must be refused with costs. It is quite clear that a defendant by entering a rule for *non pros.*, at a time when he was

(a) 8 Ir. Law Rep. 410.

entitled and might have demanded security for costs, waived his right to obtain it. A party cannot be allowed at the same time to urge the plaintiff to proceed and then stay him from proceeding.

T. T. 1851.
Common Pleas.

PARKE
v.
PARKE.

BALL J., and JACKSON, J., concurred.

Motion refused with costs.

In the Matter of the Estate of JOSEPH WHITSITT,
Ex parte HENRY THOMPSON.

June 12, 13.

THIS was a case sent by the Commissioners for the Sale of Incumbered Estates for the opinion of the Court of Common Pleas.

Joseph Whitsitt, being seised in fee-simple of estates in the county of Monaghan, and in *quasi* fee under leases for lives renewable for ever of certain other estates, made his will, dated the 19th of September 1832, in the following terms:—"I direct that all my just debts and funeral expenses be paid as soon as possible after my decease. I leave to my daughter Elizabeth the sum of £1000, with legal interest thereon from my death; and in case my said daughter shall die a minor and unmarried, then I leave the sum of £1000 to her two sisters, Mary and Isabella, equally, who have already been provided for by me. I leave to my brother William Whitsitt £20 yearly during his life, to be payable to him and his assigns out of the lands of Ellygish half-yearly on every first day of May, the first payment to be made on such of the said days as shall first happen after my death." And the testator gave his said brother powers of entry and distress for securing it. The testator then gave certain other annuities and legacies, and proceeded thus:—"As to all the rest, residue and remainder of my personal

A, being seised of estates held in fee-simple and for lives, devised all his real and freehold estates, subject as to one denomination to certain annuities, to his son B and to his issue male and female in such shares, manner and proportions as he might by deed or will appoint, with power to jointure a wife; and in case of the death of B without lawful issue, then he devised all his said real and freehold estates to his three daughters equally share and share alike as tenants in

common and not as joint tenants, and to their heirs and assigns. Held, that B took an estate tail in the fee-simple lands and in *quasi* tail in the freeholds for lives.

T. T. 1851.
Common Pleas.
In re
 WHITSITT'S
 ESTATE.

"property not disposed of already, I leave and bequeath the same to my son John Whitsitt, and I give and devise to my said son all my real and freehold estates, subject as to the said lands of Ellygish to the aforesaid annuities, and to *his issue male and female in such shares, manner and proportions as he may by deed or will duly attested direct, limit or appoint*, with power to my son to charge the same with an annuity or jointure for any wife he may take, in any sum not exceeding £150 yearly; *and in case of the death of my said son without lawful issue*, then I give and devise all my said real and freehold estates charged with the said annuities, and subject to such jointure not exceeding £150 yearly as aforesaid, to my three daughters equally, share and share alike, as tenants in common and not as joint tenants, and to their heirs and assigns." The testator died, and Joseph Whitsitt the owner entered into possession; and by an indenture dated the 11th of June 1841, and made between himself of the one part and Henry M'Vettie of the other, and which professed to be executed for the purpose of barring all estates tail, remainders and reversions vested in him, Joseph Whitsitt conveyed to H. M'Vettie, his heirs and assigns, the towns and lands of Mullyglassan, Clonanunchy, Mullindarough, Sillue, Kilaun and Ellygish, Tullynahunnion, and all the estate, &c., of Joseph Whitsitt therein, to hold part of the said lands which were held in fee to the use of Joseph Whitsitt, his heirs and assigns, and other parts which were held on leases for lives renewable, for the lives of the *cestui que vies* and such others as should be added, discharged from the estate tail, remainders and reversions then subsisting. This deed was duly enrolled in Chancery, and on the 27th of July 1848 Joseph Whitsitt conveyed all his interest in the lands comprised in the disentailing deed by way of mortgage to Henry Thompson, the petitioner in the Incumbered Estates Court. Joseph Whitsitt the owner is still unmarried. The questions submitted for the opinion of the Court were—First, what estate Joseph Whitsitt the owner took in the fee-simple lands under the will of his father Joseph Whitsitt the elder? Secondly, what estate Joseph Whitsitt the owner took in the lands held for lives renewable under the said will? Thirdly, what estate did Henry Thompson the mortgagee take in the lands comprised in his mortgage?

B. Stephens (with whom were *Ross Moore* and *Hutton*), for the petitioner in the Incumbered Estates Court.

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Common Pleas.

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ESTATE.

We contend that Joseph Whitsitt the younger took an estate tail in the fee-simple lands, and in *quasi* tail in the freeholds for lives, and that by the deed of the 11th of June 1841 he became entitled in fee or *quasi* fee to both denominations; or, secondly, that he took an estate for life, with a vested remainder in fee, as heir-at-law, and that by the deed of the 11th of June 1841, both estates having been conveyed to the re-lessee to uses, the life estate was merged in the remainder in fee, and the use executed in favour of Joseph Whitsitt being commensurate with that conveyed to H. M'Vettie, the contingent remainders were destroyed.

The gift to Joseph Whitsitt, subject to the annuities, implies that the testator intended to give him an estate which would continue long enough to enable him to pay them. In *Doe v. Cooper* (a) a devise of land to one for the term only of his natural life, and after his decease to his issue as tenants in common, but in case he should die without leaving issue, then a devise over, was held to give the devisee an estate tail. And it has been established by a series of decisions that a limitation to one for life, and after his decease to his issue or heirs of his body as tenants in common, will not prevent the implication of an estate tail in the first taker: *Doe v. Applin* (b); *Pierson v. Vickers* (c); *Tate v. Clarke* (d). Although the effect of such a construction is to deprive those who would have taken in case the estate was divided, and give it all to the eldest son, and that even where there is no gift over, *Doe d. Atkinson v. Featherston* (e)—if the will shows a general intention that the lands should not go over until failure of the issue of Joseph Whitsitt, the power to appoint among them will not alter the construction: *Jesson v. Wright* (f); *Crozier v. Crozier* (g); because such a power will take effect in derogation of the estate tail: *Doe d. Cole v. Goldsmith* (h); *Seale*

(a) 1 East, 229.

(b) 4 T. R. 82.

(c) 5 East, 547.

(d) 1 Beav. 100.

(e) 1 B. & Ad. 944.

(f) 2 Bligh, 1.

(g) 3 D. & W. 353; S. C. 5 Ir. Eq. Rep. 415.

(h) 7 Taunt. 209.

T. T. 1851. *v. Barter* (a): neither will the power to jointure, which was the case
Common Pleas. in *Croly v. Croly* (b). The present case is stronger than any of
In re those cited. Here there is no express estate for life given, and there
 WHITSITT'S is a devise over in case of the death of his son without lawful issue.
 ESTATE.

The following cases were referred to in the 'course of the argument:—*Franklin v. Lay* (c); *Irwin v. Cuff* (d); *Briscoe v. Briscoe* (e); *Martin v. McCausland* (f); *Phillips v. Phillips* (g); *Lessee Blackwell v. Hale* (h); *Delap v. Hall* (i); *Doe d. Cannon v. Rucastle* (k).

Law (with whom was *Brooke*), for Robert Thompson and wife, and James Fiddes, the parties entitled in remainder.

The object of the Commissioners in directing the present case to be submitted for the opinion of the Court was, for the purpose of having the authorities in this country, on the effect of a gift, to a person and his issue in such shares as he shall appoint, followed by a limitation over in case he should die leaving no issue, reviewed. The cases which have been cited on the construction of similar limitations where the words "heirs" or "heirs male" are used, do not apply. The word "heirs" can only refer to a series of persons, as they can only take successively, while issue may take collectively. Such are the cases of *Pierson v. Vickers* (l); *Doe v. Featherstone* (m); *Doe v. Smith* (n), cited on the other side. The case of *Jesson v. Wright* was decided on the ground that an intention was exhibited by the testator to embrace all the issue of William Wright, which could only be effected by giving him an estate tail; but that case only decided that the words "heirs of the body" operate as words of limitation, where otherwise the children cannot

(a) 2 B. & P. 485.

(b) Batty, 1.

(c) 6 Mad. 258; S. C. 2 Bligh, 59, n.

(d) Hayes, 30.

(e) *Ib.* 34.

(f) 4 Ir. Law Rep. 340.

(g) 10 Ir. Eq. Rep. 513.

(h) 12 Ir. Law Rep. 531.

(i) 1 Ir. Jurist, 312.

(k) 19 Law Jour. C. P. 100.

(l) 5 East, 548.

(m) 1 B. & Ad. 944.

(n) 7 T. R. 531.

take estates of inheritance. The words "heirs of the body" are technical words and have a particular signification; "issue," on the other hand, is a word of flexible meaning, and to be construed either a word of purchase or limitation, as the apparent object of the testator will be best effected. If the gift to the issue be sufficient to give them the fee as tenants in common, the parent will be held to take only an estate for life. In *Doe d. Cooper v. Colles* (a), where the devise was as to one moiety of certain lands to S. N. for life, and after her decease to the issue of her body lawfully begotten and their heirs for ever, it was held that S. N. took an estate for life with remainder to her children as purchasers. In *Burnsall v. Davy* (b) the devise was of all the testator's freehold and leasehold estates to B., and the issue of her body as tenants in common; but in default of such issue, or being such, if they should all die under twenty-one and without leaving issue, then over, it was held that B. took an estate for life, with contingent remainders to her children in fee; the word "estates" being sufficient to give the issue an estate of inheritance. This distinction will be found to be established by a series of decisions: *Doe d. Gilman v. Elvey* (c); *Lees v. Mosely* (d); *Greenwood v. Rothwell* (e), and *Slater v. Dangerfield* (f). In *Merest v. James* (g) the limitation over was in default of such issue, or in case none of such issue *should live to attain the age of twenty-one*, which latter words were held sufficient to give the fee to the issue. In *Crozier v. Crozier* (h) the power of appointment enabled the tenant for life to appoint the inheritance, and it was held that in default of appointment the objects of the power took the fee. In *Montgomery v. Montgomery* (i) the description of the subject of the devise carried the fee to the issue. The only cases cited on the other side which conflict with this rule are *Doe v. Applin* (k) and *Doe v. Cooper* (l);

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(a) 4 T. R. 294.

(c) 4 East, 313.

(e) 5 M. & G. 628.

(g) 1 Br. & B. 484.

(i) 8 Ir. Eq. Rep. 740.

(b) 1 B. & P. 215.

(d) 1 Y. & C. 589.

(f) 15 M. & W. 263.

(h) 5 Ir. Eq. Rep. 415.

(k) 4 T. R. 82.

(l) 1 East, 229.

T. T. 1851. *Common Pleas.* but both these cases were decided at a time when the words "all my freehold estate at A, or my messuages and lands at A," were held not to carry the inheritance; and also on the doctrine which has been corrected by later authorities, that cross remainders could not be implied between more than two; and this will be found to explain these decisions. In the case of *Doe d. Cannon v. Ruecastle (a)*, cited on the other side, the words were not sufficient to carry the inheritance to the children.

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But secondly, even assuming a devise to a man with remainder to his issue, as tenants in common, would not of itself make the issue take as purchasers; yet in a case where there is no gift to the issue, except that implied from a power of appointment, the estate can only be implied in favour of the objects of the power. In *Target v. Gaunt (b)* the testator devised a term of years to his son Henry for life, and, after his decease to such of the issue of the said Henry as he should appoint, and in case Henry should die without issue, then over; it was held that the words "such issue" must apply to issue such as Henry could appoint to, and that it referred to issue living at his death. The same doctrine has been affirmed in *Hockly v. Mawbey (c)*; *Kennedy v. Kingston (d)*; *Walsh v. Wallinger (e)*; *Keating v. Keating (f)*; *Bruce v. Bainbridge (g)*. In the present case there is no gift to the issue except that to be implied from the power of appointment. It is sufficient for our purpose to show that "issue" does not mean issue indefinitely, but only such issue as could have taken under an exercise of the power of appointment, that is, issue living at the death.

Thirdly, where there is only a gift to a limited class of issue, the devise over must be restricted to that class. Mr. *Jarman*, in his *Treatise on Wills*, vol. 2, p. 450, introduces the discussion of this question in the following words:—"Another class of cases necessary to be noticed is where the words importing a failure of issue are preceded by a power implying in default of appointment a gift to

(a) 19 Law Jour. N. S., C. P. 100.

(b) 1 P. Wms. 432.

(c) 1 Ves. jun. 143.

(d) 2 Jac. & W. 431.

(e) 2 R. & M. 78.

(f) 1 Ll. & G. temp. Plunket, 291.

(g) 1 Br. & Bing. 123.

"the issue of the donee, living at his death; in this situation the words are evidently referential;" and this view is sustained by the cases of *Leaming v. Sherratt* (a), and in *Ellicombe v. Gompertz* (b). The rule is thus laid down by Lord Cottenham:—"Suppose provision is made for certain members of a class answering a particular description, and then a gift over is made upon the failure of the class; if it be clear that the whole of the class were not to take, the gift over, though made to depend upon the failure of the whole class, will be construed to depend upon the failure of that description of the class who were to take. And on the other hand, if it appear that all the class were intended to take, though some only are enumerated, and the gift over be upon the failure of the whole class, the Court will adopt such a construction as will extend the benefit in the best way the law will admit to the whole class." With regard to the other cases which have been cited they are capable of explanation. The case of *Croly v. Croly* was decided very shortly after *Jesson v. Wright*, and under an erroneous impression that the words "issue" and "heirs of the body" were of the same import; and that case is moreover distinguishable in these particulars—first, the lands were devised merely by local description, the word "estate" not being used; and secondly, the power was only to appoint "in such proportions" as the donee should think proper. The cases of *Irwin v. Cuff* and *Briscoe v. Briscoe* are distinguishable, inasmuch as the words there would have given an estate in joint tenancy to the issue—a circumstance which has been held to create a presumption that they were not intended to take as purchasers: *Roe d. Dodson v. Grew* (c); *King v. Burchall* (d). The judgment of the LORD CHIEF JUSTICE in *Martin v. M'Causland* is altogether founded on the authority of cases in which the words were "heirs of the body." In the cases of *Phillips v. Phillips* and *Lessee Blackwall v. Hale* the words were "heirs male;" and the last case referred to in behalf of the petitioner, *Delap v. Hall* (e), cannot be considered as an authority, for several reasons. The gift

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(a) 2 Hare, 14.

(b) 3 M. & C. 127.

(c) Wil. 272.

(d) 1 Eden. 424; S. C. Amb. 379.

(e) 1 Ir. Jurist, 312.

T. T. 1851. to the issue in that case was express. There were no words sufficient to carry the fee to the issue; and lastly it was founded upon those authorities which this Court is now called on to review. The following authorities were cited in the course of the argument: *Keily v. Fowler* (a); *Eno v. Eno* (b); *Money Penny v. Dering* (c); *Tucker v. Baker* (d); 2 *Sugden on Powers*, 6th ed., p. 257; *Lewis on Perpetuity*, p. 349.

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Hutton, in reply, cited *Tomlinson v. Dighton* (e); *Rex v. Marquis of Stafford* (f); *Campbell v. Harding* (g); *Martin v. Swannell* (h); *Simmons v. Simmons* (i).

June 17. The Court afterwards sent the following certificate:—

“We have heard this case argued by Counsel on behalf of Henry Thompson the petitioner and of Robert Thompson and Isabella his wife, and James Fiddes, and have considered it, and are of opinion that the said Joseph Whitsitt, under the will of his father, Joseph Whitsitt deceased, in the said case stated, took an estate tail in the lands and premises held by the said Joseph Whitsitt deceased, in fee-simple, and comprised in the petitioner's mortgage of the 27th of July 1848. We are also of opinion that the said Joseph Whitsitt, the owner under the said will, took an estate in *quasi* tail in the lands and premises held by his father, under lease for lives renewable for ever, and also comprised in the petitioner's said mortgage of the 27th of July 1848. We are also of opinion that the said Henry Thompson, the mortgagee under the mortgage of the 27th of July 1848, took an estate in fee-simple in the fee-simple lands therein comprised, and an estate in *quasi* fee-simple in the lands and premises therein comprised, held under lease for lives renewable for ever, subsequent to the disentailing deed of the 11th of June 1841.

JAMES HENRY MONAHAN. ROBERT TORRENS.

W. BALL.

J. D. JACKSON.”

(a) 3 B. P. C. 299.

(c) 7 Hare, 568.

(e) 1 P. Wms. 149.

(g) 2 R. & M. 390.

(b) 6 Hare, 171.

(d) 11 Ir. Eq. Rep. 104.

(f) 7 East, 521.

(h) 2 Beav. 249.

(i) 8 Sim. 22.

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*Court of
 Crim. Appeal.*

COURT OF CRIMINAL APPEAL.*

THE QUEEN v. JOHNSTON.

May 7.

FORGERY.—The following case was reserved for the consideration of this Court by **MONAHAN, C. J.**, from the Spring Assizes of 1851, for the county of Fermanagh.

The case stated that Thomas Johnston was tried at the last Assizes for the county of Fermanagh, on an indictment containing three counts.

The first count charged that the prisoner, on the 14th of January, 14th of the Queen, at Lowtherstown, in said county, feloniously did falsely make, forge and alter a certain accountable receipt for money, with intent to defraud the Guardians of the poor of the Lowtherstown union, against the peace and statute, &c., which said accountable receipt for money was as follows:—

“ULSTER BANK.—No. 1.

“Enniskillen, 14th January 1851.

“We have received from the Lowtherstown union four pounds sterling, which is placed to the credit of their account with the Ulster Banking Company.

“£40.

“S. CLARK, Manager.

“Entered.—A. H. Stockdale.”

An indictment charged the prisoner with forging the following accountable receipt:—
 “Ulster Bank
 —We have received from the Lowtherstown Union four pounds sterling, which is placed to the credit of their account with the Ulster Banking Company.—
 £40.—S. C., Manager,”—
 with intent to defraud the Guardians of the poor of the Lowtherstown union. In a second count the prisoner was charged with the uttering and publishing the receipt as true.

At the trial it appeared that the prisoner was a poor-rate collector of the union, and that it was his duty, at the time laid in the indictment, to have lodged with the Ulster Banking Company, who were the Treasurers of the L. union, a sum of £40 to the credit of the union. The Bank furnished weekly to the clerk of the union an account of the sums lodged by the collectors, for which lodgment the clerk, in auditing their accounts, gave them credit. It was also proved that the sum actually lodged by the prisoner was only £4, but that he produced the receipt to the clerk of the union as a receipt for £40, alleging that he had lodged that sum in the Bank, and that the word “four” was put in the body of the receipt through the mistake of the Bank clerk. The jury found that the prisoner altered and uttered the receipt with intent to defraud the Guardians. *Held*, that the conviction was right, this being an accountable receipt within the meaning of the Act 39 G. 3, c. 63, and the prisoner having made the alteration in a material part, calculated to deceive the clerk of the union.

* BLACKBURN, C. J.; MONAHAN, C. J.; TORRENS, J.; BALL, J.; JACKSON, J., and MOORE, J., presiding.

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T. T. 1851. The second count charged the prisoner with feloniously uttering
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Crim. Appeal. and publishing as true a certain other false, forged and altered
 THE QUEEN accountable receipt for money—[setting forth the same as in the first
 v. count, and with like intent].
 JOHNSTON.

The third count charged the prisoner with feloniously uttering and putting off a certain other false, forged and altered accountable receipt for money, with like intent as in other counts; but not setting forth the document.

The prisoner pleaded not guilty.

The first witness for the Crown, Christopher Graham, clerk of the union, stated, that the prisoner was in the month of January last a poor-rate collector of said union, and as such should, at that time, have lodged about £40 in the Ulster Bank, who were the Treasurers of the union; that on the 15th of January, the prisoner stated to the witness as such clerk at his office in the poor-house that he had lodged the £40 in the Bank the day before, and he produced and gave to witness the receipt which was produced as a receipt for the sum of £40.—[The receipt produced was as set out in the first and second counts.]—Witness stated that he had previously that morning received from the Bank their usual weekly accounts, by which it appeared that the prisoner had lodged only £4, and when the prisoner stated that it was a receipt for £40 witness pointed out to him the word “four” in the body of the receipt, and stated it was a receipt only for four pounds, and that that must be all he lodged. The prisoner persisted in asserting that it was a receipt for £40; that that was the sum he lodged; that it was a mistake of the Bank clerk to put “four” in the body of the receipt; that the proper sum was in the margin: and in corroboration of this he pointed out that on the back of the receipt, in which the different electoral divisions were named, on account of which sums were lodged, that the several items of the £40 were specified. The entry on the back of the receipt was as follows:—

Clonelly Electoral Division	...	...	...	£8	2	5
Dromore Electoral Division	...	...	...	16	1	7
Tubbree Electoral Division	...	...	...	17	16	0
				<hr/>		
				£40		0 0

Witness stated that the indorsement purported to be in the handwriting of one of the Bank clerks, and was to show the component parts of the £40, and the different electoral divisions on account of which it was paid. This witness on his cross-examination stated that the Bank furnished weekly accounts, showing the sums lodged by each collector, and it was from their account so furnished that the collectors got credit in their accounts with the union.

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Two clerks from the Bank proved that the sum lodged was £4; that when the receipt left the Bank it was a receipt for that sum; that the £4 in the margin was altered to £40, and that the indorsement on the back of the receipt was altered in the following particulars:—

£1 2 5		altered to		£6 2 5
1 1 7	16 1 7
1 16 0	17 16 0
<hr/>			<hr/>	
£4 0 0				£40 0 0

When the receipt was given to the prisoner, the indorsement showed the particular electoral divisions on account of which the sums making together £4 were paid; when the receipt was given by the prisoner to the clerk of the union, the indorsement showed how the £40 was made up.

For the defence a witness was examined who stated that he had been clerk of the union, and that the practice always had been and was, to give the collectors credit for the Bank accounts, and that the receipts were never referred to.

Counsel for the prisoner submitted that as the prisoner could, according to the evidence, get credit only for the sums stated in the account, and not for the amount of the receipt, it was not a receipt within the meaning of the statute or indictment. He also contended that as the receipt was not altered in the body, it was still a receipt only for four pounds, and therefore that the prisoner ought not be found guilty; but that an acquittal should be directed.

The learned Judge left the case to the jury, who found the prisoner guilty, stating with their finding that he had made the alteration and uttered the receipt with the fraudulent intent averred. The Judge did not sentence the prisoner; but reserved the question

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Robert Johnston, for the prisoner.

This indictment is framed under the 39 G. 3, c. 63 s. 1, which enacts:—"That if any person from and after the passing of this Act shall falsely make, alter, forge or counterfeit, or cause or procure to be falsely made, altered, forged or counterfeited, or willingly act, aid or assist in the false making, altering, forging or counterfeiting any promissory note, or any assignment or indorsement of any promissory note, &c., or any accountable receipt, acquittance or discharge for rent, or other consideration, &c., or shall falsely alter, or shall cause or procure to be falsely altered, or shall willingly act, aid or assist in the falsely altering the number, principal sum, or any part of such note or assignment, or indorsement thereof, bill of exchange or acceptance, or assignment, or indorsement thereof, accountable receipt, or any receipt, acquittance or discharge for rent, or other consideration, or any note, bill, or other security for payment of money, &c., or order for the payment of money, or for procuring or giving credit, with intention to defraud any person or persons, bodies politic or corporate whatsoever, or shall utter or publish as true any false, forged, altered or counterfeited promissory note, &c., or any accountable receipt, acquittance or discharge for rent, or other consideration, &c., or any note, &c., in any of which the number, principal sum or any part of such note or indorsement or assignment thereof, bill of exchange, or acceptance or assignment or indorsement thereof, accountable receipt or any receipt, acquittance or discharge for rent or other consideration, or any note, bill or other security for payment of money, &c., shall have been falsely forged, counterfeited or altered with intention to defraud any person or persons, bodies politic or corporate, whatsoever, knowing the same to be false, forged, altered or counterfeited, then every such person so offending, and being thereof lawfully convicted in due course of law, shall be deemed guilty of felony," &c. The document in question is alleged in the indictment to be

"an accountable receipt," and the evidence shows that the forgery consisted in the addition of a 0 to the 4 in the indorsement.

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First then, as the transaction was solely one between the Bank and the person lodging the money, and as the prisoner could get credit only for sums lodged with the Treasurer, this was not an accountable receipt within the meaning of the statute. The receipt did not operate to discharge the collector of the union as against the Guardians; he was not bound to produce the receipt, nor was he entitled to credit for the sum mentioned in it, but only for such sum as might appear by the Bank book to have been lodged by him; therefore this indictment cannot be supported, as the only intent laid is to defraud the Guardians of the poor, whereas it should have been an intent to defraud the Bank. It is necessary that the party intended to be defrauded may be prejudiced. An accountable receipt can only be passed between the party receiving money and the party paying it; but here the party was not bound to produce this receipt to the Guardians; they gave him no credit for it.

MONAHAN, C. J.—He actually tendered it as a genuine document to the Guardians, and claimed credit for it, and the jury have found that he did so with a fraudulent intention.

BLACKBURNE, C. J.—Whatever he did, it is plain he did it with intent to defraud the Guardians. What do you say on the second point?

Secondly, as this instrument was not altered in the body of it, it is no forgery; for the indorsement is no part of the receipt, and the figures in the margin are not an essential part of it, and are frequently omitted. Forgery is a false making (which includes every alteration of, or addition to, a true instrument), a making *malò animo* of any written instrument for the purpose of fraud and deceit (a); it must be such as is capable of deceiving a person of ordinary observation, and also it must be an alteration in a material part. In *Chitty on Bills* it is laid down that where a bill of exchange

(a) 2 East, P. C. 852.

T. T. 1851. was made in figures for £245, and the words written in the body of
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Crim. Appeal. it were two hundred pounds, evidence was held admissible to explain
 THE QUEEN the omission of the £45: *Saunderson v. Piper* (a). But even if
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 JOHNSTON. part, it is not such a making as would deceive a person of ordinary
 observation: *Rex v. Sheppard* (b).

Smyly and *J. Perrin*, for the Crown.

As to the first point, it was the duty of the clerk of the union to check the Bank accounts and the accounts of the collector, and the attempt was made to deceive him when so doing by the collector.

Secondly, the alteration of the receipt was in a material part: *Elliott's case* (c); *Young v. Grote* (d); *Rex v. Teague* (e).

Johnston replied.

BLACKBURN, C. J.

The Court are unanimously of opinion that this conviction was right. The receipt in the present case was an accountable receipt within the meaning of the statute; and the alteration was a forgery of the instrument in such a way as was calculated to defraud and deceive the party to whom it was presented; the conviction therefore must be affirmed.

(a) 5 Bing. N. C. 425.

(b) R. & Ry. 169.

(c) 2 East, P. C. 951.

(d) 4 Bing. 253.

(e) R. & Ry. 33.

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Queen's Bench

JOHN O'BRIEN v. LEWIS TYLEE, and others.*

(*Queen's Bench.*)

June 17.

THIS was a case sent by the Lord Chancellor for the opinion of this Court.

The case set out an indenture dated the 15th of January 1803, made between Alexander Shearer of the one part and Nicholas Mahon of the other; which witnessed, that Alexander Shearer, for the considerations and covenants therein mentioned, had demised, and thereby did demise, to Nicholas Mahon, in his actual possession, &c., all that and those that piece of land known by the name of Ramparts, in as large a manner as the same was formerly held by the late Alexander Shearer and his undertenants from John Brennan, containing two acres, one rood and seven perches, as described in a lease thereof made to the said Alexander Shearer (bounded as therein described); and all that and those that piece of land known by the name Gort's Collop, in as large a manner as the same was formerly held by the said Alexander Shearer and his undertenants from Lord Viscount Pery, containing four acres, three roods and five perches, as described in the lease thereof made to the said Alexander Shearer by the said Lord Viscount Pery (bounded as therein described), situate in the parish of St. John and suburbs of the city of Limerick, with all and singular the ways, easements, &c.; *Habendum* unto Nicholas Mahon, his heirs and assigns, for three lives therein named and the life of the survivor, and such other life as by virtue of a covenant for renewal should be thereto added, at the yearly rent of £89. 8s. 9d. The indenture contained a power of distress and re-entry on the non-payment of the rent, and a covenant by Alexander Shearer to renew on the dropping of the lives, on the payment of a pepper-corn if demanded on the falling of each life.

In a memorial executed by the grantee of a deed it is not necessary to validate the registry that such memorial contain the place of abode of the subscribing witness or witnesses to it. 8 G. 1, c. 15, only applies to deeds registered after the death of the grantees.

* *Coram* BLACKBURN, C. J., and CRAMPTON, J.

T. T. 1851. It contained covenants by Nicholas Mahon for himself, his heirs and assigns, to pay the rent, and to keep the premises in tenantable repair, and a further covenant by Alexander Shearer for peaceable possession; and also that it might be lawful for Nicholas Mahon, his heirs or assigns, to surrender the premises to Alexander Shearer, his heirs or assigns, on the 1st day of May in any year during the said term, upon giving twelve months' notice of the intention to surrender, and leaving the premises in tenantable order.

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This deed was executed by Alexander Shearer and Nicholas Mahon in presence of William Crowe and Thomas Alexander Hemsworth on the day of its date; and on the 12th of May 1813, a memorial purporting to be a memorial of said lease was lodged in the office for the registry of deeds with the Registrar appointed for that purpose, pursuant to the statute in that case provided, and was by him filed, entered and placed upon record in the said office, and said original lease was produced to him at the time of entering such memorial. The following certificate of registration was by him indorsed upon the said original lease on the day and year last mentioned, and was signed by him when so indorsed, and the said memorial was numbered and the day of registry entered thereon.

"A memorial of the within deed was entered in the Registry-office in the city of Dublin on the 12th of May 1813, at one o'clock, in B. 649, p. 20, No. 454,918; and the execution of said deed and memorial was duly proved, pursuant to an Act of Parliament in that case made and provided."—JOHN GRIFFIN, Deputy Registrar.—Fees 5s. 11d."

The memorial was under the hand and seal of Nicholas Mahon, and was signed and sealed by him in presence of, and was attested by, the said William Crowe, and by Edmond Moroney and James Conway; and an affidavit was made by said William Crowe, and sworn by him before James Wall hereinafter mentioned, and was subscribed to and at foot of said memorial and affidavit; and said memorial and affidavit are in the words and figures following:—

"Lib. 663, 91, 454,918.

"To the Registrar appointed by Act of Parliament for Registering Deeds,

"Conveyances and soforth.

"A memorial of an indented deed of release bearing date the 15th

“day of January, A.D. 1803, made between Alexander Shearer of
 “Kensington in the Kingdom of Great Britain, Esq., of the one
 “part, and Nicholas Mahon of the city of Limerick, Esq., of the
 “other part, whereby the said Alexander Shearer, for the considera-
 “tions therein mentioned, did demise and set unto the said Nicholas
 “Mahon all that and those that piece of land commonly called and
 “known by the name of the Ramparts, in as large and ample a
 “manner, and to and with the said meres and bounds and descrip-
 “tions as the same was formerly held by the late Alexander Shearer,
 “Esq., M.D., and his undertenants, from John Brennan, containing
 “two acres, one rood and seven perches, as described in the lease
 “thereof made to the said Alexander Shearer, M.D., bounded on
 “the east by John’s Chapel, on the west by the lands of Gort’s
 “Collop, on the north by John Brennan’s waste plot and part of
 “Lord Pery’s ground, and on the south by Mr. Taylor’s holding and
 “Gort’s Collop; and also all that piece of said land known by the
 “name of Gort’s Collop, in as large and ample manner, and to and
 “with the same meres and bounds and descriptions as the same
 “were formerly held by the said Alexander Shearer, M.D., and his
 “undertenants, from Lord Viscount Pery, containing four acres,
 “three roods and five perches, as described in the lease thereof made
 “to the said Alexander Shearer by the said Lord Viscount Pery,
 “bounded on the east by Father Davy’s Lane, on the west by the
 “Old Windmill Road, and the north by the Ramparts and Old
 “Mass Lane; which said lands and premises are more particularly
 “described on the map thereof thereunto annexed, and situate, lying
 “and being in the parish of St. John and suburbs of the city of
 “Limerick: to hold unto the said Nicholas Mahon, his heirs, execu-
 “tors, administrators and assigns, for and during the lives and life
 “of Nicholas Henry Mahon, Henry D’Esterre Mahon and Mary
 “Margaret Mahon, three children of said Nicholas Mahon the
 “lessee, and the survivor and longest liver of them, with covenant
 “for perpetual renewal of said demise, at and subject to the yearly
 “rent of £89. 8s. 9d., and to a pepper-corn fine; which said deed
 “was duly executed by the said Alexander Shearer and Nicholas
 “Mahon respectively, in the presence of, and is witnessed by,

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T. T. 1851. "William Crowe of the city of Limerick, writing clerk, and Thomas
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 O'BRIEN "Alexander Hewsworth of the city of Limerick, Esq.; and this me-
 v. morial, as to the execution thereof by the said Nicholas Mahon,
 TYLER. "is also witnessed— "NICHOLAS MAHON (Seal).

"Signed and sealed by the said Nicholas Mahon in presence of

"WILLIAM CROWE.

"EDMOND MORONY.

"JAMES CONWAY."

"The above-named William Crowe, aged upwards of forty years,
 "maketh oath and saith he is a subscribing witness to the original
 "deed, whereof the above is a memorial, and also to said memorial :
 "saith he saw the said deed duly executed by the above-named
 "Alexander Shearer and Nicholas Mahon respectively, the perfecting
 "parties thereto; saith he also saw the memorial duly executed by
 "the said Nicholas Mahon, and that the name so subscribed as a
 "witness to said deed and memorial respectively is this deponent's
 "proper name and handwriting. "WILLIAM CROWE.

"Sworn before me in the city of Limerick the 1st day of

"May 1813, a Commissioner of said Court for Receiving

"Affidavits in said city; and I know the deponent.

"J. WALL.

"Registered the 12th of May 1813."

At the time when the said affidavit was sworn and the said memorial was placed upon the registry, James Wall therein named was a Commissioner duly appointed and authorised pursuant to the statute 25 G. 3, c. 36, to take the said affidavit attached to said memorial.

The opinion of the Court was requested on the following question:—"Whether the said lease of the 15th of January 1803 has been sufficiently and properly registered?"

T. Galway (with him *Serjeant O'Brien*), in support of the memorial.

This memorial was lodged with the Registrar on the 12th of May 1813, and the original must have been produced at that time; it is signed and sealed by Nicholas Mahon the lessee in pre-

sence of William Crowe. It is objected that the memorial only stated the date of the lease, and that under 8 *G.* 1, c. 15, the witnesses' names and their places of abode should be stated; but the answer to the objection is, that 8 *G.* 1 does not refer to the class of deeds of which this is one. The preamble of 8 *G.* 1, c. 15, says:—
 “Whereas by an Act of Parliament made in this kingdom in the sixth year of the reign of her late Majesty Queen Anne, intituled
 “‘An Act for Publick Registering of all Deeds, Conveyances and
 “‘Wills that shall be made of any honours, manors, lands, tenements and hereditaments,’ it is amongst other things enacted
 “[reciting the 6th section of 6 *Anne*]; and whereas a doubt hath
 “arisen whether, in case of the death of the immediate grantee or
 “grantees in any such deed or conveyance before his, her or their
 “having duly executed a memorial, the execution of a memorial
 “by the heirs, executors, administrators or assigns of such grantee
 “or grantees be sufficient, in order to the entering and registering
 “such memorial, within the intent and meaning of the said recited
 “Act, &c., for remedy whereof he it declared and enacted.” It then provides that grantees or devisees dying before they execute a memorial, their heirs, executors, &c., may sign and seal a memorial; and that in all memorials thereafter to be signed and sealed, the place of abode of the subscribing witness or witnesses to such memorial, who is not a subscribing witness to such deed or deeds, conveyance or conveyances, will or wills, shall be inserted in said memorial.

That statute is only directory, and was not to extend the benefit of 6 *Anne* to the representatives of grantees of deeds.—[CHAMPTON, J. Does the word “all” apply to all deeds, or merely to those referred to in the preamble?—Only to those in the preamble; for it was with that particular class of deeds the Legislature was dealing, and the words “for remedy whereof” govern the statute: *Crespigny v. Wittenoom* (a). Buller, J., in that case observes that although the preamble cannot control the enacting part of a statute, which is expressed in clear and unambiguous terms, yet if any doubt arises on the words of the enacting part, the preamble may be

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(a) 4 T. R. 793.

T. T. 1851. *resorted to to explain it ; and in Emanuel v. Constable (a), the*
Queen's Bench Master of the Rolls (Sir John Leach) says, in giving judgment :—
 O'BRIEN v. TYLEE. "I agree that the preamble of a statute cannot control a clear and
 "express enactment ; but the plain intent of the Legislature is
 "expressed in the preamble, and the nature of the mischief which
 "is sought to be remedied may serve to give a definite and qualified
 "meaning to indefinite and general terms."—[BLACKBURNE, C. J.
 There appears to be no addition to the witnesses' names in the lease
 itself.]—The omission of them in the memorial will not vitiate it :
Bennett v. Daniel (b) ; Morris v. Mellin (c). These were cases in
 which the section of an Act of Parliament required the defeazance
 and a warrant of attorney to be written on paper or parchment on
 which the instrument itself was written ; and the Court held that
 that section only applied to such warrant as fell within the previous
 section of the Act, and did not include every warrant of attorney.
 The title of the Act in those cases was, "An Act for Preventing
 "Frauds upon Creditors upon secret warrants of attorney to confess
 "judgment ;" and its preamble recited that "injustice is frequently
 "done to creditors by secret warrants of attorney to confess judg-
 "ment ;" and yet it was held that the enactment itself was narrower
 than the preamble, and that the generality of the expression at the
 end of the clause did not give the section a general operation. The
 object of the Registry Acts was the protection of purchasers, and
 the 6 *Anne*, c. 2, was the first statute giving priority to deeds
 according to their registry. This memorial fulfils all the conditions
 of that statute of *Anne*, and unless 8 *G.* 1 repeal that statute, the
 memorial is good. The 6 *Anne*, c. 2, s. 6, enacts that all and every
 memorial of deeds and conveyances to be registered shall be put
 into writing on vellum or parchment, and directed to the Registrar,
 under the hand and seal of some or one of the grantors, or some or
 one of the grantees, his, her or their guardians or trustees, attested
 by two witnesses, one whereof to be one of the witnesses to the exe-
 cution of such deed or conveyance, which witness shall by affidavit
 prove the signing and sealing of such memorial, and the execution

(a) 3 *Rus.* 438.(b) 10 *B. & C.* 500.(c) 6 *B. & C.* 446.

of the deed or conveyance mentioned in such memorial, and the day or time of the delivery of such memorial to the Registrar or his deputy.

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J. L. Fitzgerald and *Thomas Fitzgerald* (with them *Martley* and *Greene*), contra.

No reason can be offered for the omission of the residences of the witnesses that would not equally apply to the omission of the residences of the parties to the deed. The memorial derives no efficacy because of its being placed on record: *Jack d. Rennick v. Armstrong* (a). The 8 G. 1 was a declaratory enactment, and cannot therefore be confined to a class. It explains and governs the 6 Anne.—[BLACKBURNE, C. J. The words "such memorial" refer to a particular class.]—The tenor of 8 G. 1 shows that the Legislature contemplated its provisions to be of general application; and this is evident from the 3rd section, which directs that the certificates of the satisfaction of mortgages, whether executed by mortgagees or their representatives, are to contain the places of abode of the attesting witnesses.—[CRAMPTON, J. These appear to have been in the contemplation of the Legislature, independent of the remedial character of this enactment, namely, the death of the parties, and the remote period at which the memorial may be executed, and in which new witnesses might be necessary. That would appear to suggest some reason for a difference in the statutes.]—The original provision does not dispense with the necessity of witnesses to the deed.—[BLACKBURNE, C. J. Under the statute of Anne the memorial may be executed by the grantor or grantee; and this latter Act appears to apply altogether to memorials executed by the representatives of grantees, and has nothing to do with grantors.]—The statute of Anne is quite general in its enactments; "such deeds" in that enactment applies to all deeds.—[CRAMPTON, J. But if it be limited to a class, "such" must apply to that class.]—The tendency of recent decisions has been to give full effect to a statute, though there be not negative words in it; and the whole policy of the registry code is to protect purchasers, and to prevent fictitious

(a) 1 H. & B. 727, appx.

T. T. 1851. names being added to the memorial. The 8 G. 1 does not vitiate
Queen's Bench any former, but it provides for future, registrations: *Murphy v.*
O'BRIEN *Leader (a)*. The places of abode of the subscribing witnesses to
v. the memorial should therefore have been inserted.
TYLEE.

Serjeant O'Brien, in reply.

The evil to be remedied by the 8 G. 1 was not as to memorials executed by parties themselves.—[BLACKBURNE, C. J. It appears to be a declaratory Act so far as it enables the heir to execute the memorial, and enacting so far as it describes the mode of execution. Suppose both witnesses to the deed were alive, their description would not be necessary. This Act for the first time introduces witnesses foreign to the original transaction, and leaves the other class just as they were.]

Cur. ad. vult.

The Judges gave the following certificate:—

We have heard this case argued by Counsel, and have considered it, and we are of opinion that the said lease of the 15th of January 1803 has been sufficiently and properly registered.

F. BLACKBURNE.

P. C. CRAMPTON.

June 20, 1851.

(a) 4 Ir. Law Rep. 139.

E. T. 1851.
Common Pleas.

TRENCH v. HINDS.

(*Common Pleas.*)

April 30.

LEFROY moved that the plea filed in this cause on behalf of the defendant John Hinds, and the several other persons therein named, might be set aside for irregularity. This was an ejectment for non-payment of rent. The declaration was filed on the 4th of March 1851, and in addition to John Hinds included the names of several other persons. It appeared from the affidavit of the defendant's attorney that he was retained by John Hinds alone to defend the ejectment; that being absent from home he had instructed a professional friend in town to act for him, and had directed him to file a plea for John Hinds; and that this gentleman had by mistake included the names of all the defendants in the plea; that a consent had been afterwards furnished to amend the plea by confining the defence to John Hinds,* to which the plaintiff refused to accede.

In an ejectment for non-payment of rent, where the attorney acting for one defendant had by mistake included in his plea other defendants for whom he was not authorised to appear, the Court permitted the plea to be amended without an affidavit of merits.

Hamilton Smythe, for the defendant John Hinds.

The notice of motion is insufficient, for not specifying the grounds of the motion, and the nature of the irregularity complained of: *Larkin v. Lawder* (a). We offered to amend the defence and to pay the plaintiff any costs which might be occasioned by our mistake. The Court will permit us to amend. An affidavit of merits is not necessary to obtain an order to amend a plea: *Mackey v. Given* (b); *Brennan v. Monahan* (c); *Page v. Murphy* (d); although necessary where it is sought to set aside a judgment.

Lefroy, for the plaintiff.

The plea in this case is irregular. In England we would be entitled as a matter of course to mark judgment. In *Jenkins v.*

(a) 7 Ir. Law Rep. 227.

(b) Alc. & Nap. 397.

(c) 4 Ir. Law Rep. 415.

(d) 4 Ir. Law Rep. 417.

E. T. 1851. *Creech* (a), the Court refused to permit the defendant to amend by adding a plea. In *Free v. Hawkins* (b) the defendant's attorney, not having received instructions as to the nature of the defence, pleaded a sham plea, and the defendant was only permitted to withdraw it on an affidavit of merits; and in *Rice v. Field* (c), and *Uniacke v. Becher* (d), where the plea was a nullity, the plaintiff was held to be entitled to mark judgment, which the defendant would not be permitted to vacate without an affidavit of merits. In *Domville v. Lane* (e) the defendant was not permitted to amend by adding a plea of the Statute of Limitations, 3 & 4 W. 4, c. 27, having already pleaded several pleas under which he could obtain the benefit of the statute 8 G. 1, c. 4, there being no affidavit of merits.

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MONAHAN, C. J.

We are of opinion that the application for liberty to amend must be granted. It is a matter of great importance that a uniformity should be observed in the practice of the different Courts, and that we should not hastily depart from decisions which are the same in substance as the present. The cases which have been cited in the course of the argument by the defendant's Counsel establish that if the informality be such as would render the plea demurrable, the defendant, in case the plea be specially demurred to, will be allowed to amend without an affidavit of merits. These are the decisions upon such pleas as the general issue, or the Statute of Limitations; and on principle, we do not see any distinction between a plea which is open to demurrer and one which is liable to be taken off the file for non-compliance with the rules of the Court; more especially in a case like the present, where, by leaving the defendant only the same defence as before, the plaintiff is not prejudiced. We think therefore the defendant is entitled to an order to amend by striking out of the plea the names of the other defendants,

(a) 5 Dow. 293.

(b) 7 Taunt. 278.

(c) 3 Law Rec. N. S. 33.

(d) Ibid, 133.

(e) 1 C. & D. 184.

and as the plaintiff's notice of motion was informal in not specifying the grounds of the irregularity, that we should not give any costs of the motion.

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BALL, J., and JACKSON, J., concurred.*

* TORRENS, J., *absente*.

DE BATHE v. MARTIN and others.

Michs. Term
1851.
Nov. 4.

TRESPASS.—The first count of the declaration alleged that the defendants, on the 25th of October 1850, broke and entered a certain close of the plaintiff's (describing it by abutments), and then and there destroyed a great part, to wit, &c., of the ditches of the said plaintiff, belonging to the said close, and thereby and therewith choked and filled up the same.

The second count was for breaking and entering the said close on the 1st of November 1850, and at divers other days and times between that day and the commencement of the action, and placing large quantities of turf and stones, and continuing the same without the license and against the will of the plaintiff.

Third plea to the first count—*Actio non*; because they say that before the said time when in the first count mentioned, to wit on the 24th day of October 1850, at &c., the said plaintiff was seised in his demesne as of fee of and in the said close in the said first count of the said declaration mentioned, and in which and soforth, with the appurtenances; and being so thereof seised, afterwards, to wit

and assigns, for one year certain, and thenceforward from year to year as long as should be agreed upon; *virtute cujus* the defendant J. M. afterwards, to wit on the day and year aforesaid, entered and became and was possessed thereof for the term aforesaid, wherefore the said J. M., in his own right, and the other defendants as his servants, broke and entered the said close, &c., *quæ sunt eadem*. Held, that the plea was bad as amounting to the general issue.

To a count in trespass for breaking and entering the plaintiff's close on the 25th of October 1850, the defendants pleaded that before the said time when, &c., to wit on the 24th of October 1850, the plaintiff was seised in his demesne as of fee of the said close; and being so seised, afterwards, to wit on the day and year last aforesaid, and before the time, &c., demised the said close to the defendant J. M., his executors, administrators

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on the day and year last aforesaid, at Trim aforesaid, and before the said time when and soforth, in the said count mentioned, he demised the said close in which and soforth, with the appurtenances, to the defendant John Martin, to have and to hold the same to the said John Martin, his executors, administrators and assigns, from thenceforth for the term of one year from the day of the making of the said demise then next following, and fully to be completed and ended, and so from year to year for so long a time as the said plaintiff and John Martin should please; by virtue of which said demise the said John Martin afterwards, to wit on the day and year last aforesaid, at Trim aforesaid, entered into and upon the said close in which and soforth, and became and was possessed thereof for the said term so to him thereof granted as aforesaid; wherefore the said John Martin in his own right, and the said other defendants as his servants, and by his command, at the said time when and soforth, broke and entered the said close, in which and soforth, and committed the said alleged trespasses in the introductory part of this plea mentioned, in the said close in which and soforth, as they lawfully might for the cause aforesaid; *quæ sunt eadem*.

The fifth plea was pleaded to the second count in the same terms as the third plea. Special demurrer to both, on the ground that they amounted to the general issue, and gave no colour.

Cruise (with whom was *Macdonogh*), for the plaintiff.

These pleas are clearly bad, for the reasons assigned. Pleas of justification must confess the act complained of, and avoid it. The pleas in the present case do not confess the act complained of; they show that the plaintiff was not in possession, and that the defendant did not therefore commit the trespass complained of. The cases will be found to establish the principle, that nothing can be pleaded specially which the plaintiff would be bound to prove on a plea of the general issue; and the cases which seem to support a contrary opinion are distinguishable: *Maggs v. Amas* (a); which was assumpsit on a promise to pay the debt of another. It was held that a plea of the Statute of Frauds was good; but the effect of that

(a) 4 Bing. 470.

plea was not a denial of the facts in the declaration, but only a matter of defence arising out of the Statute of Limitations. The cases of *Buttemere v. Hayes* (a), *Leaf v. Tuton* (b), were decided on the effect of the new rules of pleading. These pleas give no colour: *Stephen on Pl.*, ed. 1827, pp. 240 to 252; 1 *Chitty on Pl.*, 7th ed., p. 539. A plea claiming for the defendant a possessory title, and not giving express colour, is bad, for it contradicts the very gist of the plaintiff's action of trespass. In this case the defendant is averred to have entered before the day on which the trespass is alleged by the declaration to have been committed, and that possession is not shown to have been taken out of him. The defendant is bound to follow the plaintiff's declaration as to time, and dates, though stated under a *videlicet*, are traversable if they become material as showing the order in which the events occurred. The plea of *liberum tenementum* is a good plea in confession and avoidance, for it tacitly admits that in point of fact the plaintiff may have been in possession of the close, or that he may have such an interest in the land as will support his action, as a lease for years, or a right to the vesture: 1 *Saund.* p. 299, C; but the plea should state the entry on the lands by virtue of that right, and that such entry constituted the trespass complained of. Here the plea shows the defendant in possession at the time the trespass was committed, so that he must in point of fact have trespassed on land in his own possession.

The following authorities were cited: *Com. Dig.* tit. *Pleader*, 3 M, pp. 40, 41; *Leyfield's case* (c); *Jaques' case* (d); *Hatton v. Morse* (e).

Hayes (with whom was *Battersby*), contra.

The plea does not state that the entry was before the time when, &c.—[MONAHAN, C. J. Does not the word "wherefore" import that the defendant committed the act of trespass by reason of the antecedent facts—namely, the demise, and the entry under that demise? The defendant could not be possessed of the term, as he

(a) 5 M. & W. 456.

(c) 10 Rep. 91 a.

(b) 10 M. & W. 393.

(d) Styles, 355.

(e) 3 Salk. 273.

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alleges, until entry.]—It is no test to apply to the present pleas that the facts stated might be given in evidence under the general issue; as in an action of debt for rent, the defendant may plead an entry and eviction before the rent accrued, or he may give it in evidence under the general issue. It is not necessary that a plea in confession and avoidance should give colour where a title is pleaded derived from the plaintiff: *Brooke's Abr.* tit. *Colour. Pl.* p. 27; and in *Hatton v. Morse (a)*, it is laid down by Holt, C. J., "that in "trespass *quare clausum fregit*, if the defendant pleads that the "plaintiff was seised, and made a lease to him for years, there is no "occasion to give express colour, because the defendant allows that "the plaintiff hath the reversion, which is colour enough."—[BALL, J. How could the plaintiff maintain trespass in right of his reversion only?]*—Jaques' case* is distinguishable; the title there, as far as appears from the report, may have been derived from a third party. Here the plea contains an allegation that the plaintiff was seised, which implies possession; the plea therefore is analogous to that of *liberum tenementum*. The defendant is in no case bound to give the plaintiff sufficient title to maintain the action, but merely such a colourable title as will give him an *apparent* right: *Leyfield's case (b)*; *Warner v. Wainsford (c)*; *Birch v. Wilson (d)*; *Whittington v. Bozall (e)*; *Stephen on Pleading*, 2nd ed., p. 241, n. i; and *Appendix*, p. 62; *Bacon's Abr. Pleading*, G, 3.

Macdonogh, in reply.

The plea of *liberum tenementum* is altogether distinguishable; for it admits that the plaintiff is in possession, and that the defendant is *prima facie* a wrong-doer: *Brest v. Lever (f)*. The colour required in pleas in confession and avoidance must be that which gives colour to the plaintiff's possession, and it must have continuance. In *Hallett v. Birt (g)*, which was an action of trespass for

(a) 3 Salk. 273.

(b) 10 Rep. 88, a.

(c) Hob. 127.

(d) 2 Mod. 274.

(e) 5 Q. B. 139.

(f) 7 M. & W. 593, reported as *Grice v. Lever*, in 9 Dowl. 246.

(g) 1 Ld. Ray. 218.

taking the plaintiff's cows, a plea by which the defendant alleged that the plaintiff took and impounded the cows, being the cows of J. S., and that J. S. replevied them, on which the defendant as Steward of the Hundred delivered them to him, was held to be bad; because the cows having been the property of J. S., and thus being in the custody of the law, the defendant did not give sufficient colour to the plaintiff, inasmuch as it was not continued; here admitting that the allegation of seisin in the plaintiff implies possession, it is not continued.

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Cur. ad. vult.

MONAHAN, C. J., now delivered the judgment of the Court.

In this case, which was an action of trespass, the declaration contains two counts. The first count states that the defendants, on the 26th of October 1850, broke and entered a close of the plaintiff's, and committed acts of trespass thereon. The second count is in substance the same, except that the breaking and entering are alleged to have taken place on the 1st of November 1850. To these the defendant has pleaded several pleas. The third plea to the first count states in substance that before the commission of the alleged trespasses the plaintiff was seised in fee, and being so seised demised to the defendant John Martin for the term of one year certain, and then from year to year so long as the plaintiff and defendant should please; and that in pursuance of that demise the defendant entered and became possessed of the said premises for the said term so to him thereof granted: showing not only a lease made to the defendant, but that the defendant had entered and was in possession of the close in question under the said demise before the commission of the alleged trespass; and then it contains the following allegations:—
 "Wherefore the said John Martin in his own right, and the said
 "other defendants as his servants and by his command, at the said
 "time when and so forth, and during the continuance of the said
 "term so to him thereof granted as aforesaid, *broke and entered* the
 "said close, which are the same trespasses as are complained."

The plea to the second count is substantially the same, and the objections assigned to both of these pleas are similar, namely, that

M. T. 1851. they both amount to the general issue, and are vicious as giving no
Common Pleas. colour. It is quite clear that on a plea of the general issue to an
 DE BATHE action of trespass *quare clausum fregit*, the plaintiff is bound to
 v. prove not only that the trespasses complained of were committed,
 MARTIN. but that the plaintiff was in possession of the premises on which the
 alleged trespass took place at the time of the commission; and there-
 fore the defendant must, in order to defend himself in such an action,
 by his plea, either traverse those matters, or confessing them, must
 show a possessory title in himself, while at the same time he shows
 that the plaintiff was in possession, and also that he has some appa-
 rent, but not well founded, right to such possession, so as to give the
 plaintiff an apparent right to maintain the action. Accordingly, all
 the precedents stating a possessory title in the defendant allege that
 while the defendant was so in possession he was dispossessed by the
 plaintiff, and also state plaintiff's claim under which he entered; and
 that the defendant, to regain his possession from the plaintiff, com-
 mitted the trespasses complained of. The plaintiff's alleged title,
 which is what is called express colour, is an alleged charter of
 feoffment for the party from whom the defendant derived *title*;
 and a plea of this description, to be good, must in ordinary cases
 not only show that the plaintiff dispossessed the defendant, but must
 also give colour to the plaintiff's entry by showing the title under
 which he entered. *Brooke's Abr.*, the case of *Hatton v. Morse (a)*,
 and other authorities, have been cited to show that when the defend-
 ant claims under a demise a possessory title derived from the plaintiff,
 it is not necessary to give colour to the plaintiff. That is quite true,
 as the ordinary colour, of a charter of demise to himself, could not be
 alleged, and it will be presumed that he entered under the title to the
 reversion vested in him; but this does not dispense with the other
 necessary allegation, that in fact he entered on defendant's posses-
 sion and dispossessed him. As the plea at present stands, it appears
 that the defendant committed the alleged trespasses while he himself
 was in possession, and therefore amounts to the general issue. The
 demurrer must therefore be allowed.

Demurrer allowed.

(a) 3 Salk. 273.

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Queen's Bench

GOUCHER v. GOUCHER.

(*Queen's Bench.*)

Nov. 15.

EJECTMENT on the title, tried before Monahan, C. J., at the Summer Assizes of 1851, for the county of Kildare. The day the plaintiff's title accrued was stated in the declaration to be the 1st of January 1851.

The plaintiff gave in evidence a lease bearing date the 24th of February 1791, whereby Joseph Huband demised the premises in question to William Goucher and John Goucher for three lives, and the life of the survivor. He further proved the death of William Goucher, and that John Goucher, after his decease, remained in possession of the premises until his death in 1834. William Goucher left four sons him surviving, of whom the lessor of the plaintiff (William) was the eldest. After the death of William Goucher, (the elder) John, his second son, took possession, and the two younger brothers lived with him. John died in 1844, when the two younger brothers remained in possession until 1849, when one of them died, leaving the other (the defendant) in sole possession. It further appeared that the plaintiff had been abroad for several years, and that he returned about six months prior to the bringing of the ejectment, and was received by his younger brother, and lived in the house for several months with him, during which time the defendant paid rent in the presence of the plaintiff. No demand of possession was made prior to the day plaintiff's title was stated to have accrued; but one was made on the 14th of February. The summons was served on the 11th of April.

The plaintiff having closed his case, defendant's Counsel called for a nonsuit, on the ground that the defendant's possession appeared to have been with the assent of the plaintiff, and that the action could not be sustained without a demand of possession, prior to the day of the demise in the declaration.

The Chief Justice intimated that he would leave the question

In an ejectment on the title, brought on a demand of possession, the day on which the plaintiff's title accrued was laid on a day prior to the day of the demand of the possession; and at the trial the Judge allowed the date of the plaintiff's title accruing to be altered to a day subsequent to the demand of possession. *Held*, that the Judge was authorised in making such amendment, but that the defendant was entitled to the costs of preparing for trial, as he might have been prejudiced by the amendment.—[MOORE, J., *dissentiente*.]

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to the jury as to whether the defendant's possession was permissive? And then the plaintiff's Counsel applied to amend the declaration by changing the day on which the plaintiff's title was stated in the declaration to have accrued to the 1st of March. The Chief Justice allowed the amendment. The jury found for the plaintiff.

A conditional order having been obtained to set aside this verdict, and to enter a nonsuit, or for a new trial; or if the Court should be of opinion that the amendment ought to have been made, then that same be upon payment of costs—

Battersby (with him *Hayes* and *Mawnsell*) showed cause.

No demand of possession was necessary in this case, and the sole question was, had the Judge the power to amend the date of the demise? The date is immaterial if it be before the summons is served; and in the form given by the New Rules the date is put under a *videlicet*: *Doe d. Edwards v. Leach* (a).

Macdonogh and *Johnson*, contra.

The defendant and his brother had been in possession of these premises for years, and therefore a demand of possession was absolutely necessary. The Judge had no power to make this amendment, and if he had refused it, this Court could not review his decision. Before the statute the Court would not amend the day of a demise in ejectment, though they afterwards abandoned that practice: *Adams on Ejectment*, p. 206; *Doe d. Manning v. Hay* (b). The statute enables Courts to make amendments for furtherance of justice; but if such amendments prejudice the defendant, they can only be made on terms. In that case the extent of the demise was refused to be altered. *Jenkins v. Phillips* (c). We admit that the amendment was material to the merits, but the defendant might have been prejudiced in his defence, and therefore it is he is entitled to put the plaintiff on terms. Further, they were too late in applying for the amendment after the jury were sworn, and their case closed.—[CRAMPTON, J. It is constantly done.]—Then the sole question is as to terms, for we went to trial with confidence, as

(a) 3 Scott, N. R. 509.

(b) 1 Mood. & Rob. 243.

(c) 9 Car. & Pay. 766.

we knew the plaintiff could not succeed, as the record was made up, and we were therefore prejudiced.

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Hayes replied,

There is no evidence that the defendant applied for a postponement of the trial; his case was entirely speculative on the chance of a verdict. He had no merits: *Southee v. Denny* (a); *Whitwill v. Scheer* (b); *Lessee Ottwell v. Hamill* (c).—[BLACKBURN, C. J. Should the Judge not have made an order as to the costs?—There was an application made for them below, but the Chief Justice declined making any order, stating he left it to this Court to say if he should have made the order.—[BLACKBURN, C. J. But the terms of the statute are express, that if an amendment such as this be allowed, it should be on payment of costs to the other party.—MOORE, J. My opinion is that the defendant could not have been, and was not, prejudiced by the amendment; and I am indisposed to grant the costs.]—*Doe d. Simpson v. Hall* (d). There the date of the demise was altered, that being subsequent to the day on which the right of entry accrued: *Doe d. Edwards v. Leach* (e).—[MOORE, J. The question for the Judge below was, whether or not the defendant was prejudiced in his defence?—In *Harvey v. Johnston* (f), Wilde, C. J., observes:—"The meaning of these words (material to the merits of the case) has often been considered by the Courts, and it is unnecessary to say much on the subject now; but every amendment authorised by the statute will be in a particular material (in one sense) to the merits of the case; the meaning however I take to be material to the real, substantial question at issue in the cause." *Chapman and another v. Sutton* (g); *Peter v. Baker* (h). The only prejudice that could result to the defendant was the depriving him of a point of law, and that is no case for costs.—[BLACKBURN, C. J. It is conceded the amendment was not material to the merits; but the

(a) 1 Exch. 196.

(b) 3 Nev. & Per. 398.

(c) Blac. Dun. & Osb. 185.

(d) 5 Man. & Grai. 795.

(e) 9 Dowl. P. C. 877.

(f) 12 Jur. 961.

(g) 3 Dowl. & Low. 646.

(h) 3 C. B. 831.

M. T. 1851. difficulty I feel is in taking the case out of the express terms of the statute giving costs.—*Queen's Bench* CRAMPTON, J. In a case tried before me on the Leinster circuit I allowed some avowries to be amended
 GOUCHER v. GOUCHER. which differed in amount, on the terms of the party requiring the amendment paying the costs of preparing for trial. Justice is due to the defendant as well as to the plaintiff; and the defendant may in this case have been taken by surprise, so that I think the plaintiff should pay the costs. Supposing Counsel advised him he had a legal defence, and relying on that opinion, he went down to trial, would he not then be prejudiced by the legal defence being withdrawn?—By giving the costs to the defendant the statute will be virtually repealed, and persons will be found speculating on actions because of some mere slip.

BLACKBURNE, C. J.

I think the defendant may have been prejudiced by the amendment being made; and I cannot get rid of the difficulty suggested by the words of the statute, that such amendments are to be made on payment of costs. My opinion therefore is, that the defendant is entitled to the costs.

CRAMPTON, J.

I concur with the LORD CHIEF JUSTICE. The case was a clear one for amendment, and I cannot see how reading the statute in this way can prejudice. The defendant may have been taken by surprise.

MOORE, J.

My impression is, that the practice under the statute has been as suggested by Mr. *Hayes*, and that the prejudice referred to must be a substantial prejudice to bring it within the terms of the statute, and entitle the party to the costs. This view is confirmed by the observations of Wilde, C. J., in that case cited from *The Jurist*.

Per Curiam.

Let the cause shown against the conditional order be allowed, and let the verdict had for the plaintiff stand. Let the *postea* be handed to the plaintiff, and let him have judgment thereon forthwith, and let the plaintiff pay the defendant the costs of preparing for trial, but no costs of the motion.

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Exchequer.

WELDY v. O'FARRELL.

*(Exchequer.)*Jan.

ASSUMPSIT, for work and labour done by the plaintiff as writing clerk for the defendant a solicitor. The case was tried at the Limerick Summer Assizes 1850, before Jackson, J. The plaintiff, to support his demand, gave in evidence a letter written by him to the defendant at the time when he sent in his bill, for the amount of which the action was brought; in which he did not ask for payment, but requested the defendant to examine into the correctness of the bill. He also gave in evidence another letter from the defendant to him, *which his Counsel stated was the reply to the former*, and in which the defendant made no objection to the amount of the bill, but stated that he had then no money to pay the plaintiff, as the Company for whom he was solicitor had not settled with him. The plaintiff's case depended in a great measure on the implied admission in the defendant's letter of the correctness of the plaintiff's bill. The jury found a verdict for £147, the entire amount of the bill. A conditional order for a new trial was obtained by the defendant, on the ground of surprise; and also of fraud and misrepresentation on the part of the plaintiff in representing the defendant's letter to have been written in reply to the plaintiff's, when in fact it was not so.

Where a verdict is obtained by any misrepresentation affecting a material part of the case, it will be set aside, even though the misrepresentation was inadvertent.

Whiteside and *O'Loghlen* showed cause.

The misrepresentation had been made, but inadvertently. There was no surprise on the defendant, for he was in Court at the trial, and had the opportunity of correcting the error.

J. D. Fitzgerald and *Charles R. Barry*, in support of the conditional order, relied on an affidavit of the defendant, in which he

H. T. 1851. swore that in reply to the plaintiff's letter given in evidence, he had
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written a letter in which he distinctly stated that he would investi-
gate the correctness of the plaintiff's bill, but that he had not then
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O'FARRELL. the means of doing so, as his books, &c., were in Dublin; that this
letter had been suppressed by the plaintiff; and that the letter of
the defendant given in evidence was an answer to a request from
the plaintiff for money; and that it was not until after the trial
he found the second letter of the plaintiff which enabled him to
contradict the misrepresentation.

PENNEFATHER, B.*

In this case it is admitted that the misrepresentation complained of was made. It is said, on the part of the plaintiff, through inadvertence. That may be so. But when such an occurrence, whether wilful or not, has taken place, the Court cannot deem a verdict obtained under such circumstances satisfactory. The verdict in this case must be set aside, and a new trial granted. Let the costs of this motion abide the result, and let the plaintiff not have the costs of the former trial unless he gets a verdict for the full amount of the first verdict. The defendant in no event to have the costs of the former trial.

* *Solus.*

Vide *Long v. Bilke* (1 Sc. N. R. 176.)

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Exchequer.

JAMES DELACOUR, Treasurer of the county of Cork,

v.

The Honorable HENRY CAULFIELD.

May 29.

THIS case was tried before Jackson, J., at the Spring Assizes for the county of Cork, when a verdict was directed for the defendant. It was a suggestion of breaches upon a judgment entered up pursuant to warrant on a bond given to the plaintiff as high constable or collector of county cess for the barony of Duhallow, in the county of Cork, which was filed against the defendant as surety for one Thomas Smallman, who had been deputy collector of county cess for said barony. The bond bore date the 31st of December 1847; and immediately after its execution the said Thomas Smallman was appointed such deputy collector, and so continued until the latter end of the year 1849, during which time the plaintiff was the high constable of the said barony, and the breaches suggested were alleged to have been committed by Mr. Smallman during that time by non-payment of the amount of his collection. It was not alleged, however, that there was any breach in respect of his collection between the Summer Assizes 1847 and the Assizes of Spring 1848. After some further proofs and other evidence not material to the present question, upon which his Lordship directed a verdict for the defendant, the plaintiff read in evidence the bond and condition; and upon reading of the bond it was objected on the part of the defendant that inasmuch as under the Grand Jury Act the plaintiff's *appointment* was only from Assizes to Assizes, and as he had been, as it was admitted on his behalf, re-appointed on each Assizes, the bond was therefore, and upon the true construction of the condition, a security only for the collection between Summer 1847 and Spring 1848, and was not a continuing security for the rest of the term during which Smallman was deputy collector to the plaintiff; and

The bond of a surety for a deputy collector of grand jury cess, recited the fact of his being surety, that the deputy of the collector or high constable (which is a temporary appointment under the 6 & 7 W. 4, c. 116,) would duly collect the grand jury cess as he should be required from time to time by the collector, and for the performance of all the legal acts he required to perform, &c., and was conditioned to collect such public money as he should be by the warrant of the collector from time to time required to collect, and to pay weekly, &c., and to complete each collection, &c., and to pay the full amount thereof, and of each of them to, &c., one week at least

before the first day "of each and every Assizes," &c. Held to be a continuing security, notwithstanding the collector's appointment therein recited was temporary.

T. T. 1851. his Lordship having declared that such was his opinion, and that he
Exchequer. would eventually direct a verdict for the defendant on that ground,
 DELACOUR and having intimated to the plaintiff's Counsel that it was therefore
v. useless to go into any other evidence, Counsel did not proceed fur-
 CAULFIELD. ther with the case, and his Lordship directed a verdict for the
 defendant, which the jury found accordingly. The bond was as
 follows :—" Know all men by these presents, that we Thomas Small-
 "man of the town of Buttevant in the county of Cork, gentleman,
 "and the Honorable Henry Caulfield of Hockley in the county of
 "Armagh, are held and firmly bound unto Robert Delacour of Fairy
 "Hill in the said county Cork, Esquire, in the just and full sum of
 "£500 good and lawful money of British currency, to be paid to the
 "said Robert Delacour, or his lawful attorney, executors, adminis-
 "trators and assigns ; for the which payment well and faithfully to
 "be made, we do hereby bind ourselves and each of us, for himself,
 "our and each of our heirs, executors, administrators, and every of
 "them, jointly and severally by these presents.—Ssealed with our
 "seals, and dated this 31st of December 1847. Whereas also the
 "above-named Robert Delacour is high constable or collector of the
 "county cess on the barony of Duhallow, and county of Cork, and
 "one Thomas Smallman, having proposed to him to become his
 "deputy collector on said barony, has offered the above-named Henry
 "Caulfield to be his security for the due performance of the duty of
 "deputy collector of said barony of Duhallow, and for the due and
 "faithful collection of all such public moneys as he shall be
 "required from time to time by the said Robert Delacour to collect
 "on the said barony, and for the due performance of all other legal
 "acts he may be required to perform towards the duties generally of
 "such sub-collector. Now the condition of the foregoing obligation
 "is such, that if the above-bound Thomas Smallman do and shall
 "well and faithfully collect all such public money as he shall by the
 "warrant of the said Robert Delacour be authorised and required
 "from time to time to collect on said barony, and shall pay the
 "same to the said Robert Delacour weekly as the said Thomas
 "Smallman should collect the same, except the said Robert Delacour
 "shall otherwise direct, and shall complete each and every collection

"he shall be so required to make on said barony, and shall pay
 "the full amount thereof and of each of them to the said Robert
 "Delacour, at his office at Fairy Hill aforesaid, one week at least
 "before the first day of each and every Assizes to be holden in and
 "for the county of Cork, save and except where legal cause of non-
 "collection or impossibilities to collect the same shall be fully shown
 "and proved by the said Thomas Smallman to the said Robert Dela-
 "cour, that then and in such case the above obligation to be void
 "and of none effect, or else to stand and remain in full force and
 "virtue in law. And it is hereby further declared and agreed upon
 "by and between the parties hereto, for themselves severally and
 "respectively, and for their respective heirs, executors and admi-
 "nistrators, that in case the said Thomas Smallman shall at any
 "time or times hereafter make default in the due collection and
 "payment to the said Robert Delacour, his executors or adminis-
 "trators, of the moneys he shall from time to time be authorised and
 "required by the warrant of the said Robert Delacour to collect
 "on said barony, or in the payment of the same in the manner
 "and at the respective times aforesaid, that then and for any or
 "either of said causes, it shall and may be lawful to and for the
 "said Robert Delacour, his executors, administrators or assigns, to
 "issue one or more execution or executions upon the judgment or
 "judgments to be entered up on these presents for so much money
 "as shall remain uncollected out of said barony, or unpaid to the
 "said Robert Delacour by the said Thomas Smallman as aforesaid,
 "as far as £500, without filing a suggestion of breaches, or taking
 "any other or further proceedings to obtain such execution or
 "executions than the judgment or judgments to be entered up as
 "aforesaid."

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A conditional order having been obtained for a new trial—

Butt (with whom was *Rogers*) now showed cause.

The Grand Jury Act (6 & 7 W. 4, c. 116, s. 147) authorises the
 appointment of a high constable or collector only to collect one levy.
 It is as follows :—"And be it enacted, that the grand jury of each
 "county shall at each Assizes appoint a proper person resident in the

T. T. 1851. *Exchequer.* "barony or half barony or baronies, not being a magistrate or attorney, to be high constable and collector for each barony in such county, to collect all money which shall be presented to be raised on such barony, or any parish or townland therein, and also such barony's proportion of the money presented to be raised on the county at large; and every such high constable shall have all power and authority, and shall exercise and perform all duties now or hereafter to be by law required of any high constable," &c. Authorised to appoint deputy collectors by s. 148 :—" Provided always and be it enacted, that no person shall act as high constable or collector unless he shall have given security at the Assizes before the grand jury by whom he shall have been appointed, or before the Justices of the Peace at the sessions, if such high constable or collector shall have appointed at sessions, by two sufficient sureties joining with him in executing a bond and warrant of attorney without stamp to confess judgment to the treasurer of the county, conditioned for his duly collecting and paying to such treasurer, on or before the first day of the next Assizes, all such public money as he is or shall be required by him to collect, &c.; and every high constable and collector as aforesaid may, by writing under his hand and seal, appoint a deputy collector or deputy collectors for whom he shall be answerable, to assist him in collecting the public money," &c. That the recital in the bond of Smallman having proposed to become deputy collector, considered in reference to the Grand Jury Act, which only authorises the appointment for one levy, is to the same effect as if the recital was of a temporary appointment; and a recital cannot be enlarged by a condition : *Pearsall v. Summersett* (a); *Arlington v. Merriak* (b); *Liverpool Water Works v. Atkinson* (c); *Hessel v. Long* (d); *Peppin v. Cooper* (e). Lord Ellenborough, in *The Liverpool Water Works v. Atkinson*, said :—" *Arlington v. Merriak* was all-fours with the present." The words there used were as general as here, and were held to be restrained by the recital stating an appointment for a specific time, and that

(a) 4 Taunt. 593.

(b) 2 Saund. 411.

(c) 6 East, 507.

(d) 2 M. & S. 363.

(e) 2 B. & Al. 431.

case was decided by Lord Chief Justice Hale and the other Judges on great consideration. That where by law an office is temporary, and the Act of Parliament regulating it is recited in the bond, the effect is the same as if the fact of the office being temporary were expressly recited: *Wardens of St. Saviour's v. Bostock (a)*; *Hassell v. Long*, and *Peppin v. Cooper*.

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G. Fitzgibbon (with *Lane*), in support of the conditional order.

The words in the recital, "as shall be required from time to time," show, without any reference to the condition, that it was the intention that the bond should be a continuing security; but even though the recital in the bond be of an annual office, yet where the condition provides for more than one appointment, the obligation is not confined to one year: *Augero v. Keen (b)*. This is not a security for the principal—the annual officer—it is only for the deputy; and the annual officer, who may be re-elected, takes from the deputy a continuing security.—[LEFROY, B. Parties may enter into such a contract, but it must be in the plainest terms. Where the office is temporary the inference is that the security is temporary. Here the office is temporary, and the deputy of the officer can have but a temporary appointment.]—The principal may contemplate his own re-election, and enter into a contract for security to continue so long as he shall be re-elected, and the deputy re-appointed. The question comes to this, whether there is such a contract? *Merle v. Wills (c)*; *Tanson v. Bell (d)*; *Curling v. Chalklen (e)*.—[LEFROY, B. There is nothing in the Act that requires the appointment of a deputy, or that requires security from him at all, much less new security; and in that is the distinction between the principal and the deputy in reference to their securities. *Hassell v. Long*, *Peppin v. Cooper*, and that class of cases, only determine that general words in the condition will be construed by the recital, where no violence is done to the rules of construction.]

(a) 2 Bos. & P. 175.

(b) 1 M. & W. 390.

(c) 2 Camp. 413.

(d) 2 Camp. 39.

(e) 3 M. & S. 502.

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The Court will not be astute in construing words against a surety.—[PENNEFATHER, B. The surety is a party to the bond, and we must construe his words as those of any other person; and "*verba fortius accipiendū contra proferentem*" is a sound principle].—*Addison on Contracts*, p. 730; *Leadley v. Beans* (a); *Bamford v. Hes* (b).

PIGOT, C. B.

We are of opinion that the verdict for the defendant cannot be sustained. The principle of law is clear that has been laid down for the defendant. Where the office is for a limited period, general words in the condition will not extend the liability, and that, on the ordinary principle that you are to expound a contract in reference to its subject matter. If the terms of the condition are clear and distinct, these terms shall bind, although there may be some defect in the recital. In this case, coupling the condition and recital, and construing the contract in reference to the subject matter, there exists no ambiguity. But what is the subject matter? It is the office of the principal and the office of deputy. Now the office of principal is not merely to pay; it is also to collect the entire sum he may be required to collect. That is his obligation, not only according to the Act of Parliament, but also under the condition of the bond which he is, under the provisions of the Grand Jury Act, bound to enter into. He therefore found it necessary to secure from his deputy the performance of similar duties to the one which he had to discharge, that is to say, that he should be under an obligation not only to pay but also to collect. The bond consequently recites: "Whereas the above named Robert Delacour is high constable, &c.; and the said Thomas Smallman, having proposed to become his deputy collector in said barony, has offered the above named Hon. Henry Caulfield to be his security for the due performance of the duty of deputy collector, &c., and for the due and faithful collection of all such public moneys as he shall be required from time to time, by the said Robert Delacour to collect on said barony, and

(a) 2 Bing. 32.

(b) 3 East, 380.

“for the due performance of all other legal acts he may be required
 “to perform towards the duties generally of such collector,” And
 the condition is, “that if the above bound Thomas Smallman do
 “and shall well and faithfully collect all such public money as he
 “shall by the warrant of the said Robert Delacour be authorised
 “and desired *from time to time* to collect on said barony, and shall
 “pay the same to the said Robert Delacour weekly, as the said
 “Thomas Smallman shall collect the same, except the said Robert
 “Delacour shall otherwise direct, and shall complete *each and every*
 “*collection* he shall be so required to make on said barony, and shall
 “pay the full amount thereof and of each of them to the said Robert
 “Delacour at his office at, &c., one week at least before the first day
 “of each and every Assizes, to be held, &c., and it is hereby further
 “declared, &c., that in case the said Thomas Smallman shall at any
 “time or times hereafter make default in the due collection and
 “payment to the said Robert Delacour, his executors or administra-
 “tors, of the moneys he shall from time to time be authorised and
 “required by the warrant of the said Robert Delacour to collect on
 “the said barony, or in the payment of the same in the manner and
 “at the respective times aforesaid,” &c.

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It is quite possible that the terms of the recital and condition may be applicable to a deputy appointed for the collection of a portion of a district, or for a specified time over the entire of the district; but for whatever purpose the deputy is appointed, it is obvious to my mind that the bond contemplates more than one collection and one appointment. And where the appointment has been made, how and where is the duty to be performed? It must be to do some portion of his own duties; and he has no power to collect, save what he is directed to collect by the treasurer's warrant. How is it possible for the words, “by the warrant, &c., from time to time to collect,” and “complete each and every collection,” and “shall pay &c., one week before the first day of “each and every Assizes”—how is it possible, I say, that this obligation should apply, unless more than one Assizes were contemplated, and more than one warrant? If it apply to other warrants, it must imply an authority derived from more than one period of the col-

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PENNEFATHER, B., concurred.

LEFROY, B.

There is one observation only that I would make. It has been said, that those consequences would flow from holding the bond to be a continuing security, viz., that the surety might be made liable by the re-appointment of the deputy after a period of time; but I think the words "of each and every Assizes" refer plainly to continuous appointments.

Cause shown disallowed.

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JOHN WARD v. W. D. FREEMAN.

(*Queen's Bench.*)

May 3.
 Nov. 7, 18.

CASE.—The declaration stated that the defendant, before and at the time of the hearing of the cause thereafter mentioned, to wit, on &c., at &c., and from thence hitherto hath been, and still was, Assistant-Barrister for the county of Galway, duly nominated and appointed; that theretofore to wit, on &c., at a General Session of the Peace holden at Galway, in and for the county Galway, before divers Justices of our Lady the Queen, assigned to keep the peace in and for the said county, and to hear and determine, &c., a certain Court of our Lady the Queen, commonly called a Civil Bill Court, was held in and for the division of said county called the division of Galway, by and before the defendant, then and there being such Assistant-Barrister; at which Court a certain cause by English bill or paper petition usually called a civil-bill, in which cause one Thomas Commins was plaintiff, and the now plaintiff was defendant, in a certain action of assumpsit, to wit, an action for the sum of &c., being a cause of action within the jurisdiction of the Court, was heard and determined by the Court; and the now plaintiff was at the time of service of the civil-bill resident within the jurisdiction of the Court, to wit, at &c., and that having been duly served with the civil-bill, then and there at the Court duly appeared by his attorney, to wit, C. R., and defended the action; that thereupon such proceedings were had that it was ordered and decreed by the Court that Thomas Commins should recover from the now plaintiff the sum of &c., together with six shillings costs (setting out the decree); as by the record of the Court might appear. That after the pronouncing of the decree, and before it issued, to wit on &c., the now plaintiff, having just grounds of appeal from the decree, and then

The functions of an Assistant-Barrister as to receiving civil-bill appeals are of a judicial character, and where an Assistant-Barrister refused to take a civil-bill appeal pending the hearing of Crown business, without assigning any reason for such refusal, *Held*, that no action could be maintained for such refusal.

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and there thinking himself aggrieved, and being in fact aggrieved by the decree so made and pronounced, intended and was desirous of appealing therefrom to the Judges of Assize for the county of Galway, at the Assizes next after the decree had been made and pronounced. That the plaintiff afterwards, to wit, on &c., paid to A. D., then and there being attorney in the cause for Thomas Commins, the sum of six shillings, the amount of the costs of the decree, of which the defendant had notice; and that thereupon afterwards, and during the Court, and before the issuing of the decree, to wit, on &c., the now plaintiff tendered and offered to the defendant to enter before him, so being Assistant-Barrister, into a recognizance of double the sum decreed against him, to wit, the sum of &c., with sufficient bail, to wit, R. L. and T. D., with a condition to said recognizance to the effect following, &c. (setting out condition). That R. L. and T. D. were, and each of them was, sufficient bail in that behalf, and were ready and willing and offered to enter into the recognizance, and the plaintiff then and there tendered and offered the defendant to appeal from the decree to the then next Justices of Assize; and C. R., being the attorney who so appeared for the plaintiff on the hearing and determination of the cause, was willing and offered the defendant to make an affidavit in writing before him as Assistant-Barrister, that the appeal was not, as he believed, made for the purpose of delay, but that there was probable cause for reversing the decree so made and pronounced. That the plaintiff then and there requested the defendant, so being such Assistant-Barrister, to take the affidavit of C. R., and that C. R. should be sworn on &c., to the truth of his affidavit, and to accept and take the recognizance and acknowledgment thereof by the plaintiff and his sureties in order that he might prosecute his appeal to and before the Judges, &c., according to the form of the statute in that case made and provided, and to receive the appeal of the plaintiff from the decree. And although it was the duty of the defendant, he being such Assistant-Barrister, to have taken the affidavit of C. R., and swear him as to the truth thereof, and also to have accepted and taken the recognizance, and to receive the appeal, and thereupon to have stopped all proceedings on the

decree; and although the plaintiff was willing, and offered, to pay all fees in respect of the taking of the affidavit, recognizance and appeal, nevertheless the defendant, not regarding the statute in that case made, &c., nor his duty in that behalf, but contriving and wrongfully intending unjustly to aggrieve and oppress the plaintiff in that behalf, and to prevent and hinder him from appealing from the decree to the Judges, &c., and not regarding his duty as Assistant-Barrister, or the statute in that case, &c., and the laws of the land, absolutely refused to take the affidavit of C. R., or to swear him to the truth thereof, or to take the recognizance, or the acknowledgment thereof, or any other recognizance or affidavit whatsoever, for the purposes aforesaid, or to receive the appeal or to stop the proceedings on the decree so pronounced: and for want of said appeal the decree afterwards, to wit at the said Court, issued forth of the Court, then and there marked for the sum of, &c., and signed by the defendant as such Assistant-Barrister, and by one J. R., then and there being Clerk of the Peace of the county, having been then and there entered and registered in the book kept by the Clerk of the Peace of the county for entering and registering of causes decreed and determined by the Court by English petition or paper bill: by means of which premises the plaintiff was deprived of his appeal and of the benefit and advantages thereof, and precluded and hindered from procuring the decree to be reversed, as he could and might have done but for the committing of the grievances by the defendant.

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The declaration then alleged that the Sheriff of the county issued his warrant, empowering persons therein named to execute the decree, and that certain goods of the plaintiff were seized in execution; and that plaintiff, in order to prevent a sale thereof, paid the amount of the decree and the costs to the plaintiff in the civil-bill, and that thereby plaintiff was then and there greatly exposed and injured in his credit and circumstances.

The defendant pleaded the general issue.

The case was tried before MOORE, J., at the Spring Assizes of 1851, for the county of the town of Galway, and the first witness produced for the plaintiff was his attorney in the civil-bill proceed-

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ings, and also his attorney on the record; and he deposed that Mr. Freeman was Assistant-Barrister of the county of Galway and the county of the town, and had so acted at the January Sessions of 1851; that he (the witness) there appeared as the attorney for the now plaintiff, to defend a civil-bill for him, and produced evidence in his behalf; that the Grand Jury were sworn on a Friday, and after that being done, the civil business was gone into, and lasted until some time on Saturday, when the criminal business was proceeded with, and thence continued to Monday; that the mode of lodging an appeal was by preparing the recognizance and affidavit in open Court, and that he paid the attorney of the opposite party in the civil-bill the costs of the decree; that on the Monday he applied to the Deputy Clerk of the Peace to take the appeal; that the Crown business was then going on, and that the Deputy Clerk told him he had instructions from the Barrister not to take an appeal during the hearing of Crown business; that he then applied in open Court to the defendant, on Monday evening, to take the appeal, when the defendant was sitting on the Bench; that he had the recognizance prepared, with the names of the parties and sureties, also the affidavits filled up, ready to be sworn, and the sureties present, and that defendant refused to receive the appeal, assigning no reason; that no proclamation had been made before he made the application to the defendant; that defendant soon after left the Bench; that the decree against the now plaintiff was given out; that he (witness) paid the amount to the plaintiff in the decree, and that the receipt was on the back of the process; that he had lodged appeals after the criminal business was ended, which were received by the defendant, and that he had so done at the identical January Sessions. On his cross-examination he admitted that it was between five and six o'clock in the evening when he applied to the defendant to take the appeal; that the books had been ruled, and the Crown business all finished; that the whole of the civil-bills had been disposed of by twelve o'clock on Saturday; that he had lodged other appeals on Friday; that he had paid the costs of the decree on Monday morning; that he could not say if he had given the affidavit to the Deputy Clerk of the Peace when he asked defendant

to take the appeal; and that he did not mention to the defendant the names of the parties when he asked him to receive it.

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Two witnesses deposed that they had practised at Sessions for twenty or thirty years, and that the practice had been to take the appeals so long as the Barrister was sitting, though after the criminal business, and up to the close of the Sessions. The plaintiff then produced one of the persons who attended the Sessions as his surety, who proved the seizure of the plaintiff's goods, under the decree, and the payment of the money to avoid their being removed. The signature of the Sheriff to the decree being proved, as also the civil-bill process and the decree pronounced thereon, and the recognizance and affidavit being then read, the plaintiff closed his case.

The defendant's Counsel then asked for a nonsuit, or if plaintiff would not consent to be called, then that the Judge should direct a verdict for the defendant, inasmuch as the defendant, as Assistant-Barrister, was a Judge of a Court of Record, and that in refusing to receive the appeal he had acted judicially, and no action was maintainable against him for such judicial act.

The plaintiff's Counsel required a direction to the effect that the refusal of the defendant to receive the appeal was not a judicial act, and called on the Judge to leave the consideration of the case upon the evidence to the jury; and if they believed the evidence, to direct them to find a verdict for the plaintiff. The learned Judge refused this direction, and directed a verdict for the defendant, expressing his opinion that the defendant, acting as a Judge of a Court of Record, was not liable in the present action for the breach of duty in the declaration alleged to have been committed; and to this direction the plaintiff's Counsel excepted.

The jury found for the defendant.

The bill of exceptions being set down for argument, the point noted was, whether the defendant, as Assistant-Barrister, is liable to an action at the suit of the plaintiff, against whom he made a civil-bill decree, for refusing to receive an appeal tendered against such decree?

M. T. 1851. The case was twice argued, once before CRAMPTON, J., and
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 May 30. be re-argued before the full Court; accordingly—

Nov. 7. *Meagher* and *Close* now appeared in support of the exception.

The Civil-bill Act (36 G. 3, c. 25) gives a party a right of appeal on certain conditions, viz., the perfecting a recognizance with sufficient sureties to prosecute the appeal, and the making an affidavit by the appellant's attorney, that there is cause for believing the decree will be reversed, and that the appeal is not taken for the purpose of delay. The statute being thus imperative, there rests in the Assistant-Barrister no discretion as to refusing the appeal. The 29th section is to this effect (36 G. 3, c. 25):—"That it shall and "may be lawful to and for any person or persons who shall think "him, her or themselves aggrieved by any decree or dismiss made "or pronounced by any such Assistant Barristers as aforesaid, to "appeal therefrom to the Judges of Assize for the respective county "where such decree or dismiss shall have been so made or pronounced, at the Assizes next after such decree or dismiss shall have "been so made or pronounced, and not after such next Assizes, &c., "which appeal the said Assistant-Barristers are required to receive, "&c., and stop all proceedings on the decree or dismiss pronounced; "the party appealing, if a defendant, first paying the plaintiff the "costs allowed by this Act, or depositing the same with the acting "Clerk of the Peace, and entering before the said Assistant Barrister into a recognizance of double the sum decreed, with sufficient bail to pay the sum decreed against him, with costs, in case "no relief shall be had upon the hearing of such appeal; and "in case the party appealing be a plaintiff, then paying the defendant, or depositing with the acting Clerk of the Peace, the costs "allowed by this Act, and entering before the Assistant-Barrister "into a recognizance in the sum of forty shillings," &c. 56 G. 3, c. 88, s. 9. 14 & 15 Vic. c. 57, s. 127, is the appeal section in the late Civil-Bill Act. The Barrister has but to take the acknow-

ledgment, the security for entering into the appeal. To construe the section as directory would be frustrating justice: *Green v. Hundred of Bucklechurche* (a); *Curriton v. Killigrew* (b):—"If a Judge refuse a plea which by law he ought to accept, an action on the case lies against him."

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If on the pleadings it appeared that the bail was refused because of the insufficiency of the securities, it would be a material thing against us, for that would imply an examination of the bail as to solvency; and a refusal to receive the recognizance, grounded on the insufficiency of the bail, might be a judicial act; but the declaration complains of a breach of duty in the Barrister arbitrarily refusing to receive the appeal.—[PERRIN, J. It is not because a Judge may do a wrong and an unjustifiable act that an action will lie.]—Yet if the act done be illegal, an action clearly lies: *Houlden v. Smith* (c).—[PERRIN, J. Suppose the LORD CHIEF JUSTICE refuse to allow a writ of error, would an action lie against him?—CRAMPTON, J. The question is simply, is the act of the Assistant-Barrister, the foundation of this complaint, a judicial one, or is it merely ministerial, like the act of a Sheriff?]

Concannon and Fitzgibbon, contra.

The declaration clearly intimates that the act complained of was a judicial one, for it speaks of the tendering of bail, which was refused by the Barrister, and thus shows that he must have exercised his judicial mind in deciding on its sufficiency or insufficiency. The law cannot now be questioned, that no action lies against the Judge of a Court of Record, acting judicially: *Taaffe v. Lord Downes* (d). Surely the receipt by the Assistant-Barrister of a recognizance is a judicial act, for it implies his determination on the solvency of the bail: *M'Quade v. M'Anally* (e); *Cahill v. Meagher* (f).—[CRAMPTON, J. That case is mis-reported.—PERRIN, J. The real question is, was the act done in a judicial

(a) 1 Leon. 323.

(b) 2 Roll. Rep. 498.

(c) 19 Law Jour. 170; S. C. 14 Jurist, 598.

(d) Hatchell's Report.

(e) 1 Cr. & Dix, C. C. 459.

(f) 1 Cr. & Dix, C. C. 485.

M. T. 1851. proceeding? and such was the position adopted in *Taafe v. Lord*
Queen's Bench Downes, that a Judge is not subject to have his conduct reviewed
 in the course of a cause by an action.]—As to taking a recogni-
 zance, it is laid down in *Noy*, p. 157, that it is a judicial act. An
 action on the case lies not against Sheriffs for taking of insuffi-
 cient bail, being Judges: *Metcalf v. Hodgson* (a); *Garnett v.*
Ferrand (b). The act of receiving an appeal is part and parcel
 of the civil-bill which has been heard before the Barrister, and is
 therefore part of a judicial proceeding; the moment a decree is
 pronounced, the plaintiff in it may require it to be given him.
 Then the Judge of a Court of Record is not answerable in an
 action for any thing he does in the course of a judicial proceeding
 before him: *Linford v. Fitzroy* (c). That 29th section of 36 G. 3
 specifies no time at which the appeal is to be tendered, or the Judge
 to receive it; but it cannot be argued that the receiving of an appeal,
 or the refusal to receive it, does not involve an exercise of the ju-
 dicial mind of the Assistant-Barrister. There is but one remedy
 against a Judge, that is by impeachment, and a *mandamus* would
 lie, to compel him to receive the appeal.—[PERRIN, J. That would
 be nugatory, for the appeal could not then be heard before the next
 going Judge of Assize, according to the requirements of the sta-
 tute.]—What then is a judicial act? It is any act which a Judge
 does in doing or refusing a thing, pending any proceeding before
 him, over which he has any legal jurisdiction: *Garnett v. Fer-*
rard. It might be a question whether a Judge, directed by
 his commission to be in a certain town on a specified day, and he
 not fulfilling that direction, would be liable in an action: *Miller*
v. Seare (d). But here is a judicial, not a mere ministerial, act
 complained of, and for the doing of which the Judge is not
 answerable: *Calder v. Halket* (e); *Hamond v. Howell* (f).

Close replied.

There is no remedy by *mandamus*, as the Court has intimated,

(a) Hutton, 120.

(b) 6 B. & C. 610.

(c) 13 Jurist, Q. B. 303; S. C. 18 Law Jour. M. C. 106;
 S. C. 3 Qu. Session Cases, 438.

(d) 2 Wm. Bl. 1140.

(e) 3 Moo. P. C. 28.

(f) 2 Mod. 218.

because the appeal must be received at the Sesaions in which the case is heard, and heard before the next going Judge of Assize, and the intervening time would necessarily elapse before a decision on the *mandamus* and return was given. The appeal here was tendered in the customary way ; and it appears on the evidence that the Assistant-Barrister received other appeals, similarly circumstanced. A Judge of a Court of superior jurisdiction is liable for non-feazance. Now we say this was a mere ministerial act, not a mere mistake in point of law in reference to the judicial function ; and the statute of 36 G. 3 demonstrates it to be ministerial ; *Schinotti v. Bumsted* (a) ; *The Queen v. Badger* (b) ; *Ferguson v. Lord Kinnoul* (c). The result is, if a statute direct a Judge to do an act, and he refuse, an action lies against him : *Dr. Bonham's case* (d) ; *The case of the Marshalsea* (e) ; *Windham v. Clere* (f) ; *Ashby v. White* (g) ; *Ackerley v. Parkinson* (h) ; *Beaurain v. Scott* (i) ; *Sutton v. Johnstone* (k) ; *Davis v. Black* (l).

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Cur. ad. vult.

BLACKBURN, C. J.

This is an action on the case, brought against the defendant, the Judge of the Civil-Bill Court of the county of Galway, for having declined to receive an appeal from a decree made by him against the plaintiff for the payment of a small debt. The declaration states the decree, the payment by the plaintiff of the costs of it, and that afterwards and during the Court he tendered to the defendant, and offered to him to enter into a recognizance with sufficient bail (naming them), with a proper condition, and there tendered and offered the defendant to appeal ; that Coll Rochfort was attorney in the cause, and offered to take the affidavit required by law that the appeal was not for the purpose of delay, and requested the de-

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(a) 6 T. R. 646.

(c) 9 Cl. & Fin. 251.

(e) 10 Rep. 76, a.

(g) 6 Mod. 45.

(i) 3 Camp. 388.

(b) 4 Q. B. 468.

(d) 8 Rep. 107, a.

(f) Cro. Eliz. 130.

(h) 3 M. & S. 411.

(k) 1 T. R. 498.

(l) 1 Q. B. 900.

M. T. 1851. *Queen's Bench* defendant to take the affidavit and recognizance, and receive the appeal; that it was the defendant's duty, and he refused to do so.

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The plaintiff examined his attorney, who swore that the Sessions commenced on Friday the 3rd of January; he then stated the proceedings; that the civil business lasted until some time on Saturday; that the criminal business continued from thence until Monday; that on Monday he applied to the Clerk of the Peace to take the appeal when the Crown business was going on, who said he had directions from the defendant not to take an appeal when Crown business was going on; that on Monday evening he applied in open Court to the defendant to take the appeal; that the Court was then sitting and defendant on the Bench; that the documents and bail were there, and the affidavit ready to be sworn; that the defendant refused to receive the appeal, but gave no reason; that no proclamation had been made before the appeal; that defendant soon after left the Bench; that the witness had lodged appeals after the civil business of the Sessions was over, which the defendant received.

After the evidence the learned Judge expressed his opinion that the defendant, acting as Judge of a Court of Record, was not liable to this action for the breach of duty alleged to have been committed by him, and directed the jury to find for the defendant, which they did.

We are now to decide whether this ruling was right. The Court of which the defendant is sued as the Judge is a Court of Record; and it must be admitted if his refusal to receive this appeal was a judicial act, it not being alleged to have been malicious, he is not liable in this action. The law in this respect is thus stated by Lord Tenterden, in *Garnett v. Ferrand* (a):—"It is a general rule, of very great antiquity, that no action will lie against a Judge of Record for any matter done by him in the exercise of his judicial functions." The plaintiff has therefore contended, as indeed he was obliged, that the allowance of the appeal was a mere ministerial act, made imperative by the express terms of the statute referred to; and that whether malicious or not, the defendant's refusal to receive it subjects him to the present action. We are now to consider whether

(a) 6 B. & C. 625.

this be so or not. I may observe, however imperative the words of the statute, they do not afford any test by which we can try whether the act to be done is judicial or ministerial. We must therefore examine what is the nature of the duty to be executed, and see whether it be such as to preclude all inquiry, and the exercise of any judgment or discretion as preliminary to its execution. That it does, is mainly rested on the assertion that the right of appeal is absolute; this it obviously is not; on the contrary, there are a number of conditions to be performed before the appeal can be received—all of them conditions for the benefit and protection of the party who has obtained the decree, each of them demanding the decision of the Judge that it has been performed. He must see that the affidavit is made by the attorney in the cause—that it is conformable to the statute—that the bail are sufficient, and the recognizance and condition what the law requires: all this he is to do, and to do in his capacity of Judge; and as the result, to decide whether the party has or has not established his right to have his appeal received, and the execution of the decree, which is the right of the opposite party, suspended.

In contending that such an act is merely ministerial, to be done at the instance and for the benefit of one of the parties, the right of the appellant has been put forward as if it were the sole object to be regarded; but so far is this from being the case, that it involves the right of both: for the allowance of the appeal is a decision between them; where it gives a right to the one it divests the right of the other. The proceedings in practice are, I believe, generally *ex parte*; yet I see no reason why the Judge should not allow the party who has obtained the decree to intervene in support of his own right, and hear him as to the form of the documents, or the sufficiency of the bail; but whether the Judge adopts this course or proceeds in his absence can make no difference; where he allows the appeal, he adjudicates on a right, and it is impossible to regard his act otherwise than as judicial. I can see no distinction in the quality of the act done between allowing or refusing to allow an appeal. The Judge in either case decides, and decides finally against one party and in favour of the other. If the appellant can

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M. T. 1851. maintain an action because the Judge improperly refuses his appeal,
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 FREEMAN. the other party must have a similar remedy if the appeal be improperly issued, for he is plainly aggrieved if the Judge have suspended the execution of his decree, the requisites of the Act not having been complied with; but my opinion is, that in neither case can the Judge be called on in a civil action to justify his act. His reasons for it may be insufficient; he may have formed an erroneous opinion on one or more of the subjects which are thus committed to his decision, but this error, unless it can be imputed to malice, is one not examinable in such a mode of proceeding.

The case of *Ferguson v. Lord Kinnoul* (a), and the passages cited from the judgments of the high authorities that decided it, have been strongly relied on as proving that the reception of the appeal in the case before us was a mere ministerial act. In that case it was decided that the Presbytery were bound to examine the presentee of Lord Kinnoul, and that their doing so was the execution of a mere ministerial act; but no one who considers that case, and the peculiar facts which called forth the strong expressions of those learned Lords, can hold it to be, as is contended, an authority in point to govern the present, or extend those expressions to a case so widely dissimilar as this is. It will be seen that the Court of Session, in a cause in which the Presbytery and many of its members were parties, decided that it was their duty to examine the presentee of Lord Kinnoul; this decision was affirmed on appeal in the House of Lords, and was reiterated by the Court of Session, which again ordered the Presbytery to obey and to proceed to examine. This they refused to do, many of the refusing members having been the very persons who had appealed and been ordered to examine. The law therefore was established by that decision, and it could not afterwards be controverted; it admitted of no further question, of no appeal. It is observable too that some of the individual members of the Presbytery were parties in the very suit in which this decision was made, which decision was afterwards made the order of the Court of Session, and which the Presbytery were bound to execute.

(a) 9 Cl. & Fin. 303.

In that case Lord Brougham says:—"Now in the present case, "that is alleged and proved which is tantamount to malice; illegal "conduct, in violation of duty, and injurious to the party, and the "conduct is alleged to be continued refusal to do an act declared by "a judgment to be imperative. In *Drewe v. Coulton* (a), and "indeed in *Ashby v. White* (b), such averment seems to have been "held sufficient allegation of malice. If the acts alleged to be "illegal, and in violation of duty, had been alleged in terms to "have been wilfully done, there can be no doubt that this would "have come up to an averment of malice. But the word 'wilful' "needs not to be used any more than the word 'malice.' The "continued illegal refusal is clearly equivalent to wilfully doing "an illegal act." Lord Cottenham's observations are alike important. It is impossible to read this case, and not to come to the conclusion that the act to be done was to execute a decree made against the Presbytery. They seem to me to have had a duty essentially ministerial, and therefore totally different from that of the defendant. For the reasons I have stated, I think the Judge was right, and that the exception must be overruled.

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Judgment for defendant.

(a) 1 East, 563, n.

(b) 6 Mod. 45.

NOTE.—*Vide Cullen v. Morris* (2 Stark. R. 577). This was an action on the case against the defendant, as the High Bailiff of Westminster, for refusing the vote of the plaintiff at the election of a citizen for the City of Westminster for Parliament; and it was held that the malice of the defendant was an essential ingredient to support the action; Abbott, L. C. J., observing:—"On the part of the plaintiff it has been contended that he has a maintainable right of action, without at all referring to the motives by which the defendant was influenced in rejecting his vote, and independently of the proof of any malicious intention on the part of the defendant. On the part of the defendant it has been contended that an action is not maintainable for merely refusing the vote of a person who appears afterwards to have really had a right to vote, unless it also appears that the refusal resulted from a malicious and improper motive; and that if the party act honestly and uprightly, according to the best of his judgment, he is not amenable in an action for damages. I am of opinion that the law, as it has been stated by the Counsel for the defendant, is correct."

The Reporters think it but an act of courtesy to a gentleman retired from the active duties of the profession, to insert the following letters in reference
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M. T. 1851. to the transaction the subject of the above action, and which appeared in the
Queen's Bench *Galway Mercury* :—

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W. D. FREEMAN, Esq.

Galway, 6th of January 1851.

DEAR SIR—Since my return from Court, I have been attacked by several of my clients, and accused of neglect in the discharge of my duty, in not having appeals lodged, although they attended all day yesterday and this morning for the purpose, but Mr. Carter would not receive them, on your authority. I greatly fear that their proceedings against me will not cease with their abuse of me, as I may be held accountable for neglect. Under these circumstances I trust you will direct Mr. Carter to receive the appeals.

COLL ROCHFORD.

Mr. Freeman wrote the following reply :—

SIR—I do not conceive that in point of law, the civil-bill sessions having finally closed on Friday, I can receive any appeals in my chamber. I regret that you and your clients should have any difference on the subject, but with that I have nothing to do.

W. D. FREEMAN.

To which Mr. Rochford rejoined :—

SIR—Notwithstanding the assumed superiority of your position, as exemplified in the courtesy of your reply to my note, I shall not follow your example ; at the same time I beg to intimate to you, that as you have declined to receive those appeals tendered to you in open Court, I shall try if I cannot prevail on the Court of Queen's Bench to issue a polite request that you will be pleased to permit me.

W. D. Freeman, Esq.

COLL ROCHFORD.

Mr. Freeman answered thus :—

Thursday, 5th of January 1851.

SIR—I will neither observe on the tone or the inaccuracies contained in your last most extraordinary note ; but as it has been my most anxious wish and practice to facilitate, instead of throwing difficulties in the way of appeals to any decision of mine, I beg to state that upon your serving notice on the opposite attorney to the intended recognizances, and moving the matter before me in open Court at Tuam, which is in this division, I shall have the question debated of your right to appeal in the cases (the names of the parties to which I am at this moment ignorant of), and I will receive the appeals, provided I be satisfied that you are entitled by law to take the course you propose.

WILLIAM DEANE FREEMAN.

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ASSUMPSIT, by the plaintiff as executor of one James Spollan, against the defendant as administrator of William Henry Magan. The declaration contained three counts. The first was the usual money count, and alleged a promise by William Henry Magan in his lifetime, and a breach by him, and by the defendant as his administrator. The second count was for money lent by James Spollan in his lifetime to W. H. Magan, and alleged a promise and breach by the defendant as administrator of the latter. The third was on an account stated between the plaintiff as executor of James Spollan and the defendant as administrator of W. T. Magan. The defendant pleaded, First, *non-assumpsit*; Secondly, that W. H. Magan, deceased, and the defendant as his administrator, *non assumpserunt infra sex annos*; Thirdly, *plene administravit*, and Fourthly, *plene administravit prater* certain outstanding judgments. The plaintiff joined issue on the first and second pleas, and on the third and fourth took judgment of assets *quando*. The case was tried before the LORD CHIEF JUSTICE MONAHAN, at the Sittings after Trinity Term 1851. At the trial the plaintiff proved a document signed by the intestate W. H. Magan, which was in the following terms:—

“Clonearle, January 1st 1834.

“James Spollan has placed in my hands £300 sterling, for which
 “I promise to be accountable for to him, with legal interest from the
 “said date.

“W. H. MAGAN.”

And also proved the death of W. H. Magan in the year 1840.
 To take the case out of the Statute of Limitations, the plaintiff gave

the entry was a sufficient acknowledgment within Lord Tenterden's Act (9 G. 4, c. 14), to take the case out of the Statute of Limitations, 10 Car. 1, c. 6, s. 2.

The cases of *Tullock v. Dunn* (Ry. & Moo. N. P. C. 416) and *Smith v. Poole* (12 Sim. 17) commented upon.

To a bill filed in the Court of Chancery by two of the next-of-kin of A, for the administration of his estate, B, the administrator, by his answer stated that the personal estate was insufficient for the payment of the intestate's debts; and in reply to interrogatories for that purpose set forth an inventory of the outstanding assets and debts; amongst the latter was contained the following entry:—“To amount of a promissory note due to J. S., inclusive of interest. £300.” Held, in an action by the plaintiff as executor of J. S., on the promissory note, on which there had been no payment of interest for six years before the commencement of this action, that

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in evidence an answer filed by the defendant in a cause of *Magan v. Magan*, which was instituted by three of the next-of-kin of the intestate for the administration of his personal estate. By this answer, which is fully stated in the judgment of the Court, the defendant insisted that the intestate's estate was insufficient for the payment of his debts, and in answer to interrogatories for that purpose, set forth in the third schedule an account of all interest on the debts of the intestate paid by the defendant since the death of W. H. Magan, among which there was an entry in the following terms:—"To cash paid James Spollan, interest on bill to the 7th of June 1840, £7. 10s.;" and in the fourth schedule, which professed to contain an account of all debts of the intestate still remaining outstanding, due and unpaid, there was the following entry:—"To amount of promissory note due to James Spollan, inclusive of interest, £300." Counsel for the defendant insisted that this was not a sufficient admission of the existence of the debt to take the case out of the Statute of Limitations. The LORD CHIEF JUSTICE decided that the admission was sufficient to save the operation of the statute; but reserved liberty for the defendant to move to have a verdict entered for him in case the Court should be of opinion that the admission was not sufficient. The other facts of the case appear sufficiently in the judgment of the LORD CHIEF JUSTICE.

Martley having on a former day obtained a conditional order to enter a verdict for the defendant—

Whiteside (with whom were *J. D. Fitzgerald* and *Coffey*) now showed cause.

The statements in the answer amount to an unqualified admission of the existence of a debt, and where such is the case the law will imply a promise. The decisions on the effect of admissions in an insolvent's schedule apply to the present case. In *McCarthy v. O'Brien* (a) it was held that such an admission was sufficient to save the bar of the statute, and the same doctrine was afterwards affirmed in *Morrogh v. Power* (b).

(a) 2 Ir. Law Rep. 67.

(b) 5 Ir. Law Rep. 494.

The words of the statute 9 G. 4, c. 14, are comprehensive, and sufficient to embrace the case of an administrator or executor. The case of *Smith v. Poole* (a) is completely analogous to the present case.

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Martley (with whom was *Hamilton Smythe*), in support of the order.

An admission of a debt by an executor stands upon entirely different grounds from that by any other person. In ordinary cases an admission by a debtor that a debt is due is equivalent to a statement that he is bound to pay it. In the case of an administrator or executor, his admission of the existence of the debt cannot bind him to pay it, unless he have assets of his testator or intestate applicable to the purpose. In the present case it appears from the answer which the plaintiff has given in evidence, that the personal estate was insufficient; that there were outstanding debts both by mortgage and judgment which should be paid before the simple contract debts of the plaintiff's testator. The mere proof of the existence of the debt will only support a promise by the testator, and not one by the executor or administrator; and in an action against the latter, containing counts on promises both by himself and the testator or intestate, it will support the latter counts, but not the former: 2 *Wms. on Executors*, p. 1659. The object of the statute 9 G. 4, c. 14, Lord Tenterden's Act, was to make the rule of law as to acknowledgment more stringent than it was under the 21st *Jac.* 1, c. 16 (*Eng.*), and 10 *Car.* 1, c. 6, s. 2 (*Ir.*); in construing these statutes the Courts rule certain acts as amounting to a continuation of the original contract, or the creation of a new one. The words of the first section of Lord Tenterden's Act are:—"That in actions of "debt, or upon the case, grounded upon any simple contract, no "acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take "any case out of the operation of the said enactments, or either of "them, or to deprive any party of the benefit thereof, unless such "acknowledgment or promise shall be made or contained by or in "some writing to be signed by the party chargeable thereby; and

(a) 12 Sim. 17.

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"that where there shall be two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, "executor or administrator shall lose the benefit of the said enactments, or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment made and signed by any other or others of them; provided always that nothing herein contained shall alter or take away or lessen the effect of any payment of principal, or interest, made by any person whatsoever." This enactment must be supposed to have been framed by Lord Tenterden, with a recollection of the law as laid down by himself in *Tullock v. Dunn*; and reading the statute with that view, the word "acknowledgment" is applicable to the case of the persons individually liable, and the word "promise" to the case of an executor. The case of *Tullock v. Dunn* has since been recognised in *Scholey v. Walton* (a). The following cases were cited:—*Browning v. Paris* (b); *Williams v. Griffith* (c); *Bateman v. Pender* (d).

J. D. Fitzgerald, in reply.

The words of the statute are sufficiently large to embrace all cases. The words are "any party," which must mean all persons who can be charged by a promise, and amongst others an executor. The statute makes a payment by one executor sufficient to bind his co-executors, while, at the same time, it makes an acknowledgment or promise insufficient to charge his co-executor. The fair inference from this is, that an acknowledgment by an executor would previously have bound his co-executor, and necessarily himself. A part payment by an executor, evidenced by the defendant's acknowledgment, would be sufficient: *Cleave v. Jones* (e). An acknowledgment given by an executor would be sufficient to charge him *de bonis testatoris*, and we do not seek to charge the defendant except in respect of any assets which he may have received.

Cur. ad. vult.

(a) 12 M. & W. 510.

(b) 5 M. & W. 117.

(c) 3 Exch. 335.

(d) 3 Q. B. 574.

(e) 20 Law Jour. N. S. Exch. 238.

The judgment of the Court was now delivered by MONAHAN, C. J. M. T. 1851.

This case was tried before me at the Sittings after last Trinity Term, when the jury found a verdict for the plaintiff for £300. The action was in *indebitatus assumpsit* by the plaintiff as personal representative of James Spollan his father, against the defendant as administrator of his father William Henry Magan the elder. The declaration contains counts stating the promises both by William Henry Magan, deceased, in his lifetime, and by the defendant, as his administrator, since his decease; and the defendant, in addition to the pleas of *plene administravit*, and *plene administravit præter*, upon which judgments of assets *quando* have been taken, has pleaded the general issue, and the Statute of Limitations to both sets of counts. At the trial the plaintiff proved a written document in the handwriting of the late William Henry Magan, dated the 1st of January 1834, which was in legal effect either a promissory note for £300, or an acknowledgment of so much money having been lent to him by the plaintiff's testator. The handwriting to this document was properly proved; and it was also proved by a statement in an answer sworn by the defendant in a certain cause in Chancery on the 1st of May 1847, that he had paid the sum of £7. 10s. as interest upon that debt up to the 7th of June 1840; and it was likewise proved that in a verbal conversation which the defendant had with a Mr. Wybrants in the year 1847 or 1848, he not only admitted the existence of the debt, but promised to pay it in a short time. On this state of facts there could be no question but that the plaintiff was entitled to a verdict upon both sets of counts, so far as the plea of the general issue was concerned; and the only question was, whether the plaintiff's evidence took the case out of the Statute of Limitations, upon the counts stating the promises to have been made by the defendant; for there was no pretence that a case was made out for taking the case out of the operation of the statute upon the counts alleging promises by W. H. Magan sen., who died more than six years before the commencement of this action. The evidence relied on by the plaintiff for this purpose was, as I have already stated, an answer sworn by the defendant on the 1st of May 1847, in the Court

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of Chancery, to a bill previously filed against him by his mother Mrs. Elizabeth Magan, and his brother and sister Dudley and Augusta Magan. The object of that bill was to have the personal assets of the late William Henry Magan duly administered in payment of his debts, and it prayed that the plaintiffs should be paid their share of the residuary estate, which they represented as considerable. The bill prayed the usual accounts of the personal estate, debts, &c., and required the defendant to set them out in his answer in the ordinary manner. In reply to the bill so filed, the defendant put in his answer, in which he did not dispute the right of the plaintiffs to the accounts they sought; on the contrary he stated, that he had offered that the accounts should be taken by mutual friends, to save the expense of a Chancery suit; but he further stated that which, if it had been correctly stated, showed that the plaintiff could derive no advantage from the suit—namely, that the personal estate was far from being sufficient for payment of the debts of the deceased. The answer also stated that the personal property actually received by the defendant amounted only to £7025. 1s. 2d., and that the only other personal assets of which the intestate was possessed at the time of his death were arrears of rent due at his decease, amounting to about £1000, together with some carriages, horses and other personal property, which the plaintiff Mrs. Magan took possession of, claiming them to be her private property, but which the defendant claimed as part of the assets of his father. The plaintiffs in that suit likewise claimed a leasehold interest in the lands of Clonard, in which they alleged the late W. H. Magan had in his lifetime only a chattel interest, but which the defendant contended was not to be considered as such, his father having at the time of his death contracted for the purchase of the fee. The answer also contained several schedules; and in the second schedule the defendant stated that he had paid debts due by his father to the amount of £23,367. 3s. 7d. The third schedule contained an account of interest paid on debts due by the intestate at his decease, as also law costs incident to the administration, amounting to £8414. 7s. 5d., including £7. 10s. paid to James Spollan on the debt the subject of the present action. So that it appeared by

these schedules taken together that the disbursements amounted to a sum exceeding £30,000, and the assets received to something between £8000 and £10,000 pounds. The answer did not profess to give any account of the outstanding assets; but in the fourth schedule, which is the important one, the defendant professes to give an account of all debts of the said intestate still remaining due and unpaid. The first part of the schedule sets forth judgment and specialty debts amounting to £21,932. 6s. 2d., and then it proceeds to state that the following are simple contract debts, the first item being—"To amount of a promissory note due to James Spollan, exclusive of interest, £300." This schedule contains entries of several other simple contract debts, and then concludes with an entry in these words:—"To amount of claim made by Mr. Robert Pearce for money disbursed for intestate for wines, &c., at Kensington, £9;" and the whole schedule is then totted to £22,555. 10s. The only other evidence in the case was, that after the filing of this answer, and, as I collect, after a decree to account had been pronounced in the cause, the plaintiff's attorney (Mr. Wybrants) informed the defendant Mr. Magan, that he was about filing a charge under the decree in that cause, on which the defendant requested him not to do so, as he was about settling with his brother, and that he would in a short time pay off Mr. Spollan's demand; or if inconvenient to do so, that he (the defendant) would give his bond for the amount.

Upon this evidence the defendant's Counsel required me to direct a verdict for the defendant on the plea of the Statute of Limitations, relying upon the case of *Tullock v. Dunn*, reported in *Ryan and Moody*. The plaintiff's Counsel, on the other hand, required me to direct a verdict for the plaintiff, relying upon the case of *Smith v. Poole*, reported in 12 *Sim.* p. 17. I was of opinion that the evidence was sufficient to take the case out of the Statute of Limitations, and so directed the jury; reserving liberty for the defendant to move to have the verdict entered for him in case the Court should be of opinion that I should have told the jury that in point of fact the evidence was not a sufficient answer to the plea of the statute.

The question has been very fully argued before us, and we have been referred to, I believe, all the authorities bearing upon the point.

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M. T. 1851. The defendant's Counsel rely on the case of *Tullock v. Dunn*, as
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 an express decision of Lord Tenterden that the admission of a debt
 by an executor was not sufficient to take the case out of the operation
 of the Statute of Limitations, the 21st *Jac.* 1. c. 16 (*Eng.*), and the
 10th *Car.* 1, sess. 2, c. 14 (*Ir.*), a decision which they say has been
 recognised and approved of by Baron Parke, in the case of *Scholey*
v. Walton (a), and also by Mr. Justice *Williams* in the last edition
 of his very valuable treatise *on the Law of Executors* (vol. 2,
 p. 1659), in which he states "that the mere existence of a debt owing
 "by the testator or intestate is not evidence of a promise to pay by
 "the executor or administrator, as executor or administrator;" and
 that "as against an executor or administrator an acknowledgment
 "merely by him of the debt's existence is not sufficient to take the
 "case out of the statute; there must be an express promise."

Now there can be no doubt that the case of *Tullock v. Dunn*
 decides that, as against an executor, an acknowledgment merely is
 not sufficient to take the case out of the statute; but it does not
 appear under what circumstances the acknowledgment in that case
 was given, or what the particular terms of it were. The facts of
 the case were—[His Lordship stated the facts].—Lord Tenterden is
 certainly reported to have said:—"I am of opinion that the plaintiff
 "must be nonsuited; the only count on which he can pretend to
 "recover is on the account stated and promise to pay by the execu-
 "tors. I think as against an executor an acknowledgment merely
 "is not sufficient to take the case out of the statute. There must
 "be an express promise; a promise by one executor only is not
 "sufficient—there ought to be a promise by both:" but of course
 these observations must have reference to the acknowledgment in
 that particular case; but what that was, we have no means of
 judging, or whether it was coupled with any reason which might be
 considered sufficient to rebut any inference of a promise. It was
 strongly argued by Mr. *Martley* that the case of *Tullock v. Dunn*
 had received the sanction of the Courts of Law in England, and
 for that purpose he cited the case of *Scholey v. Walton (a)*, but on
 looking to that case it appears that the point for which *Tullock v.*

(a) 12 M. & W. 510.

Dunn was cited in the present case did not arise. There the question was, not whether an acknowledgment by an executor was sufficient to bind him; but whether an admission and part payment by one executor was sufficient to bind all the executors? and accordingly the argument turned upon what the effect of this acknowledgment was. It was argued by the Counsel for the plaintiff in that case that there was evidence of payment by one executor, and that that was sufficient to bind the surviving executor. It was ultimately held by the entire Court that there was no evidence to show that the part payment or acknowledgment relied on was made by the executor in that character, and therefore none of the questions decided in *Tullock v. Dunn* arose in the case; but there is the opinion of Parke, B., approving of the decision in that case, so far as it held that the promise by one executor would not bind the other; but it has nothing whatever to do with the question as to whether an admission by another executor is sufficient to take the case out of the statute as against him.

Another portion of Mr. *Martley's* argument was, that whatever the law may have been before the passing of Lord Tenterden's Act, that Act contained a legislative recognition of the case of *Tullock v. Dunn*; that as the statute enacts—[His Lordship read the enacting portion of the 1st section of the statute]—it amounts to a legislative declaration, that so far as executors are concerned, an express promise is required, though in the case of persons sued in their own right, a mere admission would be sufficient. On the other hand, it was argued by the plaintiff's Counsel that the case of *Smith v. Poole* (a) is an express decision that a mere acknowledgment of the debt was sufficient, and that a promise was not required; that whatever the law was before the passing of the statute, that no distinction being taken between executors and administrators, and persons suing in their own right, and the enactment being general, that whatever would be a sufficient admission of a debt as against a person sued in his own right would be equally so against an executor or administrator. I confess, so far as I am concerned, I cannot accede to the argument of Counsel on either side as to the construc-

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tion of the statute. I see nothing in it to alter the law, whatever it was, to the sufficiency of a promise to take the case out of the statute, save only to render writing necessary in cases in which previously the admission or promise might have been verbal. Accordingly the statute states by way of preamble that whereas various questions have arisen in actions founded on simple contracts, as to the proof and effect of acknowledgments and promises offered in evidence for the purpose of taking cases out of the operation of the said enactments, and that it is expedient to prevent such questions and to make provision for giving effect to the said enactments. I consider that the effect of the statute was to alter the law in one respect, and in one respect only—namely, that as against one of two joint contractors, as distinguished from one of two executors, the written promise or admission of one shall not bind the other; but it leaves the effect of part payment of principal or interest just as it was before, and therefore it still remains to be decided what the effect will be of payment by one executor as against the other.

In my opinion therefore we must consider whether before the statute the admission or statement in the answer would have been sufficient to take the case out of the statute; and this renders it necessary to see what was the exact point decided by the case of *Tullock v. Dunn*: and on referring to that case it is, as I take it, a decision merely to this effect, that the mere admission of a debt being due by an executor is not sufficient; and if in the present case I thought necessary to our decision to overrule or act contrary to that case, so great respect do I entertain for a *Nisi Prius* decision of that eminent Judge, that I should wish to have the question put in a course of further investigation; however, as I take it that the admission in the present case is not merely that the debt is due, but that it is a subsisting valid claim on any assets that may be received applicable thereto, in priority to the claim of the plaintiff in the Chancery suit, the next-of-kin of the intestate, and as such entitled to his residuary personal estate, it appears to me that the case of *Smith v. Poole (a)* is an express decision in every respect similar to the present, and one which cannot in principle be distinguished

(a) 12 Sim. 17.

from it. The plaintiff in that case was the surviving executor of one Phoebe Smith, and the suit was an ordinary creditor's suit, instituted by the plaintiff in respect of a promissory note for £200, given by one James Poole, whose administrator the defendant was. The admission relied on was contained in an inventory and account, exhibited by the defendant in answer to a citation in the Ecclesiastical Court by one of the next-of-kin of the intestate, and it consisted of two parts; the first, which contained an inventory of the goods and effects of the intestate, which had come to the hands of the defendant. The second part, which was contained in a separate document, purported to be an account of disbursements made, and then the exhibitant proceeded to declare "that there were still outstanding "and owing the following sums and claims against the estate of the "said deceased from the several persons under-mentioned." Amongst these was the following entry:—"Executors of the late Phoebe "Smith, on note, £200; interest thereon from the 1st of October 1823, to the 1st of April 1832, £85." The case of *Tullock v. Dunn* was then relied upon as showing that the admission there was not sufficient, and that to bind the defendant as executor, there should have been an express promise. But the Vice-Chancellor says, in referring to the case of *Tullock v. Dunn*:—"I think, from the "expressions used by Lord Tenterden, that his Lordship must have "considered that what was proved in that case as an acknowledgment of the debt did not amount to evidence of a promise by both "of them to pay the debt; but here I have the case of a clear "written acknowledgment of the debt made by a sole personal "representative, and signed by him, and therefore I think that I "ought to make the common decree in a creditor's suit." That case appears to me to be completely similar to the present. In that case, as here, after the defendant had become personal representative, a suit was instituted against him in relation to the assets of some one entitled to a share of the residue; and, as in this case, the defendant was required to set forth the particulars of the personal estate, and the claims and demands upon it.

The only difference between the two cases is, that one is in the Ecclesiastical Court, the other in the Court of Chancery; there,

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M. T. 1851. as here, at the time of filing the affidavit the debts appeared to be
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SPOLLAN there, as here, he set forth the debt as one due and outstanding;
v. there, as here, he set forth other demands as claim on the assets;
MAGAN. and as I understand the case, it is a decision that an admission of a
debt being due, and a subsisting claim on the assets, was a sufficient
admission to imply a promise to pay out of the assets. So in the
present case we decide not the abstract question that the mere
admission of the existence of a debt by an executor will be sufficient
to take the case out of the statute; but that in a suit against
the executor to administer the assets, an admission that a debt
is due and a subsisting charge upon any assets which may be
received applicable to the payment thereof, is a sufficient admission
to raise a promise to pay out of the assets; and that taking the whole
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out of the assets, in priority to the claims of the next-of-kin; and
therefore we must allow the cause shown against the conditional
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- naming him correctly. *Held*, that under the detainer the prisoner was in custody "by process in a civil suit," and that therefore this Court could not discharge him on *habeas corpus*, although the arrest and custody under both the first writ and under the detainer were illegal. E. *Ibid.* 527
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The bond of a surety for a deputy collector of grand jury cess recited the fact of his being surety, that the deputy of the collector or high constable (which is a temporary appointment under the 6 & 7 W. 4, c. 116) would duly collect the grand jury cess as he should be required from time to time by the collector, and for the performance of all the legal acts he required to perform, &c., and was conditioned to collect such public money as he should be by the warrant of the collector from time to time required to collect, and to pay weekly, &c., and to complete each

collection, &c., and to pay the full amount thereof, and of each of them to, &c., one week at least before the first day "of each and every Assizes," &c. *Held*, to be a continuing security, notwithstanding the collector's appointment therein recited was temporary. E. *Delacour v. Caulfield* 669

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A, being lessee of premises in the borough of D. (which prior to his lease had been rated for the relief of the poor), demised the back premises thereof to B, and subsequent to such demise A was again rated as for all the premises contained in the original rating. *Held*, that notwithstanding such alteration of possession of part of the premises, A was entitled to be enrolled as a burgess. Q. B. *Wauchoh v. Reynolds* 142

A did not reside on the premises, but paid the rent and taxes, retaining the two parlours for his exclusive use as a counting-house: he sub-let the house to C, his servant, who resided on the premises and she let the other apartments to lodgers, reserving to herself the rent. *Held*, that such was not an occupation of the premises by A within the meaning of the Municipal Corporation Act, as entitled him to be enrolled a burgess.—[PERRIN, J., *dissentiente*.] *Ibid*. 142

Held also, A being the lessee of the entire house, and rated as such, was not entitled to be registered as a burgess in respect of his occupation of a portion of it as a counting-house, that portion not being rated separately as such. *Ibid*. 142

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2. *Quære*—Has the Court jurisdiction on a writ of *certiorari* to quash an order made by a Justice or Assistant-Barrister against a poor-law rating? *Ibid*
3. The words "such actions," in 3 & 4 Vic. c. 108, s. 175, refer to actions of assumpsit, covenant, debt, trespass for taking goods, and trover; and therefore an action of trespass for false imprisonment brought in the Borough Court of Cork is not within the provisions of that section, and proceedings had thereon are not removable by *certiorari*. Q. B. *Nott v. Fitzgibbon* 620

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1. "With respect to the costs of the former trial and of this motion, if no point existed in the case but the latter one, we should probably be of opinion that the defendant should pay

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the costs, as is usually the case when a verdict is set aside on the grounds of being against the weight of evidence. But as some legal points have arisen, particularly that as to the pendency of the action in England, which, if decided in defendant's favour, he ought not to pay the costs of the former trial, the rule as to costs will be, that if the plaintiff ultimately obtain judgment in the action, he shall have the costs of the former trial and of the motion as part of his costs in the cause; but if the defendant should ultimately obtain judgment, the parties are to abide their own costs of the former trial and of this motion." C. P. *Per Monahan, C. J. Heenan v. Clements* 52

2. Costs cannot be added to a judgment, without an affidavit that the judgment has not been registered. E. *Corbet v. Mathews* 63
3. The sum of £1 for registering judgments to be added without taxation to the £5 for costs of cases within the 19th section of the Process and Practice Act. E. *Murray v. Butler* 64
4. NOTE—Since the above case the point has been settled by the 160th New Rule—"The officer, in awarding the costs of judgments on confession, and by default, under the 19th section of 13 & 14 Vic. c. 18, as well as of judgments on bonds and warrants of attorney, shall, on production of the certificate of the registration of any such judgment under the 13 & 14 Vic. c. 74, add to the costs therein the sum of £1 as and for the costs of such registration." *Ibid* 65
5. In an action of assumpsit on a bill of exchange, when interlocutory judgment obtained by the plaintiff on parliamentary appearance, and final judgment on officer's report, the judgment is a judgment by default, and recovered in an action for liquidated sum within the meaning of the 2nd section of the Process and Practice Amendment Act. E. *Miller v. Mawnsell* 66

6. Where the costs of obtaining a judgment are not added thereto before registry, it is requisite, in order to have them added, to vacate the registry already had. *E. McMahon v. Corbett* 135
7. The registration of a judgment cannot be amended by adding thereto the taxed costs in lieu of a sum improperly added to the judgment on the roll before registry, and in consequence registered. *E. Ryan v. Nunan* 139
8. To a declaration in assumpsit the defendant pleaded the general issue, and a set-off as to part. Issue was joined on the first plea, and to the second plea plaintiff replied specially. To this special replication the defendant demurred, and the demurrer was allowed. Pending the argument on the demurrer the issue in fact was tried, and a verdict found for the plaintiff for a sum less than that included in the plea of set-off. *Held*, that under such circumstances the plaintiff was not entitled to the costs of the trial. *Q. B. French v. Cahill* 232

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1. Where by indenture, in pursuance of a covenant for renewal on payment of a peppercorn fine, which covenant provided that the nominated life was to be indorsed on the original indenture, or on a separate label or parchment, a renewal was granted in pursuance of that covenant, whereby the grantor added and inserted one life, *Habendum* for three lives, and the survivor and such other life, &c., *subject to the rent and all the covenants in the original indenture contained on the lessee's part to be done and per-*

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formed; these latter words were held to raise an express covenant to pay the rent, and that such covenant was obligatory on the defendant after assignment.—[CRAMPTON, J., *dissentiente*.] *Q. B. Luttrell v. M'Creery* 7

2. "A covenant for renewal means that the tenant is to have at all times a subsisting legal estate for three lives and the life of the survivor, and the landlord is to have all his legal remedies for the recovery of the rent."—*Per MOORE, J. Ibid* 13

3. The mere expression and declaration of intention is sufficient to make an instrument have the legal effect of a lease, as if the most formal words had been introduced. *Ibid* 14

No particular words are necessary to create a covenant. *Ibid* 15

4. The plaintiffs, holding premises under a lease, containing a covenant to keep and maintain the same in tenantable order and condition, demised the premises to the defendants as tenants from year to year. During the tenancy of the defendants an accidental fire broke out, and the premises were destroyed. *Held*, that an action on the case in the nature of waste was not maintainable against the defendants, the jury having found there was no default on their part. *Q. B. White v. M'Cann* 205

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1. In a case where a prisoner pleaded guilty to an indictment for larceny, which set forth a previous conviction for felony, and the Judge feeling doubts as to his power to pass sentence of transportation, reserved the question for consideration without sentencing the prisoner:—*Held*, that the Court of Criminal Appeal had no jurisdiction to entertain such a case.
2. *Semble*—Where a writ of error could

be brought the Court of Criminal Appeal has no jurisdiction. Cr. Ap. *The Queen v. Byrne* 100

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JUSTICE OF THE PEACE.

1. An indictment found that, in pursuance of a certain Act of Parliament, by a proclamation duly published in the "Dublin Gazette," and duly posted, with an abstract of the provisions of the said Act at the foot, according to the provisions thereof, after a certain day in said proclamation mentioned said Act should apply to and be in force in the county D., and charged that after that day, and whilst the proclamation was in force and not revoked, and whilst the Act did apply to the county of D., the prisoner, on the day and at the place specified in the proclamation, unlawfully, &c., did carry and have a certain pistol, not being licensed so to do, contrary to the form, &c. The 2nd section of the Act (on which this indictment was founded) enacted that printed copies of every proclamation issued under the Act should, with an abstract of the provisions of the Act, be posted in certain specified places. *Held*, that the posting of this proclamation was not a fact necessary to be averred or proved to warrant this indictment.
2. *Held also*, that when an indictment contains distinct averments, one material, and another immaterial, the immaterial may be rejected as surplusage; but if the whole averment cannot be struck out without getting rid of a material part, the whole must be proved. Cr. Ap. *The Queen v. Otway* 69
3. An indictment charged that A, being employed as clerk to T. M. and others, did receive into his possession a certain sum of money, and did embezzle the same. The evidence in support of this indictment was, that the prisoner was the Secretary and Treasurer of a Friendly Society, and that the property charged to have been

embezzled was vested in certain members as trustees. That on the October quarter-day the prisoner accounted, and returned a balance in his hands; that on the Christmas succeeding the next quarter-day it was the practice of the society to distribute the surplus remaining in the hands of the prisoner, but that shortly before that time he absconded with these funds without having brought forward his intermediate receipts between September and December, and that he was styled Treasurer and Secretary indiscriminately. *Held*, that the prisoner being employed to receive this money, and having undertaken the duty, he thereby virtually became clerk to the society, and responsible to it as such.

4. *Semble*—That secretary and clerk must be considered synonymous terms within the meaning of 10 G. 4, c. 56 (the Friendly Societies' Act).
5. *Held also*, his having accounted with the trustees did not alter or vary his position as clerk, or place him in the situation of trustee.
6. *Held also*, the prisoner having passed his account, and a balance being struck in September, and in the December following, and not having given credit for the intermediate receipts, but absconded, that this was sufficient evidence to go to the jury of an intention to embezzle. Cr. Ap. *The Queen v. Murphy* 91
7. The traversers were indicted for a rescue of goods seized for county rates due out of a townland, of part of which two of the traversers were, at the time the rates became due, in the occupation as tenants. No applotment of county cess had been made on the occupiers under 6 & 7 W. 4, c. 116, s. 151, and no account in writing, as directed by that section, had been served on the churchwardens or Seneschal of the parish; but a voluntary applotment was made, and an arrear accruing, the collectors distrained on the townland for the

arrear, selecting the party by whose default the deficiency appeared to arise, namely, two of the traversers. The goods seized were left on the lands until the sale day, when they were rescued by the traversers and others. *Held*, that such seizure was illegal, and that the traversers were justified in resisting the sale, as under 6 & 7 W. 4, c. 116, s. 151, the barony constable had no authority to levy county cess until he had delivered to the churchwarden or Seneschal an account in writing as directed by that section, and that therefore the conviction of the traversers for a rescue was bad. Cr. Ap. *The Queen v. Pigott*

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8. An indictment charged the prisoner with forging the following accountable receipt:—"Ulster Bank — We have received from the Lowtherstown Union four pounds sterling, which is placed to the credit of their account with the Ulster Banking Company. —£40.—S. C., Manager,"—with intent to defraud the Guardians of the Poor of the Lowtherstown Union. In a second count the prisoner was charged with the uttering and publishing the receipt as true. At the trial it appeared that the prisoner was a poor-rate collector of the union, and that it was his duty, at the time laid in the indictment, to have lodged with the Ulster Banking Company, who were the Treasurers of the L. union, a sum of £40 to the credit of the union. The Bank furnished weekly to the clerk of the union an account of the sums lodged by the collectors, for which lodgment the clerk, in auditing their accounts, gave them credit. It was also proved that the sum actually lodged by the prisoner was only £4, but that he produced the receipt to the clerk of the union as a receipt for £40, alleging that he had lodged that sum in the Bank, and that the word "four" was put in the body of the receipt through the mistake of the Bank clerk. The jury found that the prisoner altered and uttered the receipt with intent to

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defraud the Guardians. *Held*, that the conviction was right, this being an accountable receipt within the meaning of the Act 39 G. 4, c. 63, and the prisoner having made the alteration in a material part, calculated to deceive the clerk of the union. Cr. Ap. *The Queen v. Johnston* 641

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The certificate directed by 10 W. 3, c. 6, s. 1, entitling an ecclesiastical person to recover from his successor a portion of the sum expended in the improvement of a glebe, although granted after the death of the party making the improvements, is valid. Q. B. *Harte v. Byrne* 557

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1. Where judgment has been had in an ejectment for non-payment of rent by default, and an *habere* issued, the defendant is not entitled to have the proceedings stayed on payment of the rent for which the ejectment was brought, and the costs. Q. B. *Lessee Taylor v. Ejector* 27
2. A defence in ejectment will be set aside when a copy is not served with notice of the defence. Q. B. *Lessee Greer v. Ejector* 87
3. Where a party holding land for a term of years, with a strict clause against alienation or subletting, assigned a small portion to a Railway Company for a temporary purpose, the Company not dealing with the landlord or giving him any compensation, for the use of the land:—*Held*, that the landlord was entitled to maintain an ejectment on the title against the Company and his tenant for the forfeiture incurred by this subletting. E. *Legg v. The Belfast and Ballymena Railway Company* 124, n.
4. The trustee of a legal estate will be allowed to take defence to an ejectment, though not served. Q. B.—*Anonymous* 140

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5. When a lease was executed by A and B as granting parties, and reserving the rent and right of entry to A alone, an ejectment for non-payment of rent is maintainable by the representatives of A against the assignee of the lessee. Q. B. *Lessee Parke v. M'Loughlin* 186
6. Where an ejectment for non-payment of rent is brought by a Corporation pursuant to a resolution passed at a meeting of the body, any member who attended at such meeting is competent to make the affidavit required by the 252nd General Order. C. P. *Ecclesiastical Commissioners v. O'Ryan* 329
7. This Court has no jurisdiction to vary the form of notice required by the 1 G. 4, c. 87, to be annexed to the declaration in ejectment against overholding tenants, so as to suit the practice as regulated by 13 Vic. c. 18. C. P. *Cleary v. Fleming* 331
8. In an ejectment on the title, brought by trustees having the legal estate in the lands, the agent proved that he had been sent by the trustees a number of printed notices to quit, signed by them, leaving blanks for the name of the tenants and the denomination of the lands. In the agent's office one of these notices was filled up with the defendant's name, and the lands held by him, and served on the defendant, and no objection made by him. There was no evidence of any specific authority to fill up this notice. *Held*, that this was sufficient evidence to go to the jury that this notice had been served by authority of the trustees.—[PERRIN, J. *dissentiente*.] Q. B. *Jack d. Wynne v. M'Eniry* 435
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1. In an action against the acceptor of a bill of exchange, drawn by L. J., indorsed by him after maturity to H. L. F., and by him to the London and Dublin Banking Company, of which the plaintiff was public officer, the plaintiff, in order to prove consideration between L. J. and H. L. F., gave in evidence a document in the handwriting of the former, dated during the currency of the bill, in

which he stated that he held the bill for collection, and that H. L. F. had an interest in it to the amount of £700, and also the Nisi Prius record in an action by H. L. F. against L. J. in England. *Held, per MONAHAN, C. J.*, that both documents were properly received in evidence. *C. P. Heenan v. Clements* 44

2. An action having been commenced in England by H. L. F. against the defendant the proceedings in which were afterwards discontinued—*Quære*, Whether the pendency of that action was a bar to the present? *Ibid*
3. An indictment found that, in pursuance of a certain Act of Parliament, by a proclamation duly published in the "Dublin Gazette," and duly posted, with an abstract of the provisions of the said Act at the foot, according to the provisions thereof, after a certain day in said proclamation mentioned said Act should apply to and be in force in the county of D., and charged that after that day and whilst the proclamation was in force and not revoked, and whilst the Act did apply to the county of D., the prisoner, on the day and at the place specified in the proclamation, unlawfully, &c., did carry and have a certain pistol, not being licensed so to do, contrary to the form, &c. The 2nd section of the Act (on which this indictment was founded) enacted that printed copies of every proclamation issued under the Act should, with an abstract of the provisions of the Act, be posted in certain specified places. *Held*, that the posting of this proclamation was not a fact necessary to be averred or proved, to warrant this indictment. *Cr. Ap. The Queen v. Otway* 69
4. An indictment charged that A, being employed as clerk to T. M. and others, did receive into his possession a certain sum of money and did embezzle the same. The evidence in support of this indictment was, that the prisoner was the Secretary and Treasurer of a Friendly Society, and

that the property charged to have been embezzled was vested in certain members as trustees. That on the October quarter-day the prisoner accounted and returned a balance in his hands; that on the Christmas succeeding the next quarter-day it was the practice of the society to distribute the surplus remaining in the hands of the prisoner, but that shortly before that time he absconded with these funds without having brought forward his intermediate receipts between September and December, and that he was styled Treasurer and Secretary indiscriminately. *Held*, the prisoner having passed his account, and a balance being struck in September, and in the December following, and not having given credit for the intermediate receipts, but absconded, that this was sufficient evidence to go to the jury of an intention to embezzle. Cr. Ap. *The Queen v. Murphy* 91

5. Where a charge was preferred before a Justice of the Peace against a clergyman, for an assault; with intent to commit a felony, and the Justice of the Peace reduced the statement into writing in the form of a declaration as prescribed by the statute 5 & 6 W. 4, c. 62, and signed it as such Justice, and returned it inclosed in an envelope to the complainant for delivery to the Dean of the diocese according to his request, in order that this declaration might be laid before the Bishop for investigation: *Held*, that on such a state of facts a question ought to have been left to the jury to say whether the Justice of the Peace acted *bona fide*, and under the belief that he was acting in the execution of his duty, and in a matter within his jurisdiction as such Justice?
6. *Held also*, that it was for the jury to say whether, under the circumstances, the communication was a privileged communication, and whether the Justice acted *bona fide* and without malice in its publication?

7. *Seemle*—If the jury found such facts in the affirmative, the Justice was within the protection of the statute 12 Vic. c. 16, and entitled to notice of action.
8. *Seemle*—The 5 & 6 W. 4, c. 62, does not authorise a Justice of the Peace to take a declaration charging a party with a criminal offence. Q. B. *Little v. Lord Clements* 194
9. A policy of insurance effected on the life of A, contained a recital that A was a nurseryman, and had warranted and did thereby warrant several matters therein specified, respecting his age, profession, state of health and mode of life, and also contained a proviso that if A should die upon the high seas, or *felo de se*, &c., or if any thing so warranted as aforesaid should not be true, or if any circumstance material to the insurance should not have been truly stated, or should have been misrepresented or concealed, or should not have been fully and fairly disclosed and communicated to the Company, or if any fraud should have been practised on the Company, or any false statement made to them in or about the obtaining or effecting the insurance, the policy should be void, and all moneys paid on account thereof forfeited. At the trial, a proposal executed prior to the execution of the policy was proved, which contained several queries put to A, and his answers thereto; and at the foot thereof was an agreement that the particulars therein mentioned, and which might be stated by A, should form the basis of the contract between A and the Company; and if there was any fraudulent concealment or untrue allegation contained therein, or any circumstance material to the insurance should not have been fully communicated to the Company, or there should be any fraud or mis-statement, the policy should be void. *Held*, that the proposal was not part of the contract. Ex. Ch. *Anderson v. Fitzgerald* 251
10. *Held also*, that a statement made

in or about the obtaining of the policy, must not only be false but also material to the insurance, in order to vitiate the policy, and that the question of materiality was properly left to the decision of the jury.

Ibid

11. Payment of an abated rent for a period of thirty years by a tenant holding under a lease for a term unexpired is, if unexplained, evidence to go to a jury of the surrender of such lease, and the creation of a new tenancy at the abated rent; and the effect of such payment is not destroyed by the fact that during part of the time it has been made to a tenant for life with a strict power to lease. C. P. *Lefroy v. Walsh* 311

12. Replevin, for taking the plaintiff's goods in the parish of M., in a certain close called T.; the defendant avowed the taking in the *locus in quo*, because the defendant held said close called T., in the parish of M., as his tenant, at a yearly rent, for the arrears of which he distrained. The plaintiff pleaded in bar that he did not hold the said close called T., in the parish of M., *modo et forma*. At the trial it appeared that the close in question was situated in the parish of C. *Held*, firstly, that the plaintiff was not estopped from showing that the lands of which he was tenant were situated in the parish of C.; secondly, that the averment in the avowry of the parish in which the lands of T. so held were situated was material, and the variance fatal. C. P. *Uniacke v. Kirwan* 316

13. If the plaintiff declare upon a deed, and there be no plea of *non est factum*, he cannot read any part of the deed which is not on the record, without proving it by an attesting witness. C. P. *Smithwick v. Beary* 344

14. In trover mere possession is *prima facie* evidence of property; and the defendant, to rebut it, must show a better title in himself or in a third party under whom the plaintiff does

not derive. E. *Fitzpatrick v. Dunphy* 366

15. A car proprietor brought an action for damages sustained by a vehicle of the plaintiff, in consequence of some rubbish having been brought out of the house of the defendant and left in the street opposite his dwelling-house by a person employed by the defendant to remove the rubbish. The jury having found that the service for which the man was employed was to remove the rubbish entirely; *Held*, that this was but the ordinary duty of a servant, and not done as a contractor, and that the defendant was liable. Q. B. *McKeon v. Bolton* 377

16. In an ejectment on the title, brought by trustees having the legal estate in the lands, the agent proved that he had been sent by the trustees a number of printed notices to quit, signed by them, leaving blanks for the name of the tenants and the denomination of the lands. In the agent's office one of these notices was filled up with the defendant's name, and the lands held by him, and served on the defendant, and no objection made by him. There was no evidence of any specific authority to fill up this notice. *Held*, that this was sufficient evidence to go to the jury that this notice had been served by authority of the trustees.—[*PERRIN, J., dissentiente.*] Q. B. *Jack d. Wynne v. McEniry* 435

17. In an action for calls, the plaintiffs gave in evidence the sealed registers of the Company, and in each of them the defendant's name appeared as the proprietor of "two hundred shares, £300 deposit paid;" they also proved their subscription contract, and that a person representing himself to be the defendant signed it. *Held*, in the absence of rebutting evidence, that thereby the defendant's liability was established. Q. B. *Waterford Railway v. Wolsely* 444

18. Action on promissory note by payee against executrix of maker. Declara-

tion averred the note was payable at a particular place, excused presentment there as there were no assets. General verdict for plaintiff. *Held*, excuse insufficient for non-presentment. *E. Quin v. Fitzgerald* 552

19. *Held also*, that the *postea* might be amended by entering a verdict for the defendant on the special count, and for the plaintiff on the money counts.

Ibid

20. To an action of slander, for speaking and publishing of the defendant in his capacity of land agent and receiver, at a meeting of landowners, the following words:—"I quite agree with Mr. F., that the present meeting was got up by the landlords for the purpose of having their rents raised; for I of my own knowledge know a number of well conducted tenants in my own neighbourhood who have been held up to high rents, and have been compelled to give up their land for the purpose of enabling an individual (meaning the plaintiff) to get it into his own possession (meaning the said tenants were compelled by the plaintiff to give up their land for the purpose of enabling the plaintiff to get it into his own possession); and one man, having six sons, was driven out of his farm to satisfy the wishes of this person; and another tenant, who took compassion on that man and let him in, was sent to by the agent, and the bailiff told him that if he sheltered him he would be put out himself; and another most respectable man, although he wore a frieze coat, was also called upon by the same person (meaning the plaintiff) to give up his farm at forty-eight hours' notice, as he (meaning the plaintiff) wished further to enlarge his demesne and make gravel walks; and upon his asking 'where am I to go?' he was told 'you have no person but your old wife and yourself, and you may go into the byre (meaning to live in the cow-house of the said man); but if you do not give me up the land, I will put you into gaol for the rent

you now owe; he (meaning the same man) then said to the agent, 'you came to me three years ago, and my son, who was then recovering from fever, took a shivering, and you killed him, are you now going to kill me?' It turned out too true. Andy Egan was the man; he took to his bed the next day, I (meaning the defendant) attended him; and he was dead in one week, murdered by that agent, the same as his son was a few months before." The slander, as alleged in the second count, was, with some verbal differences, the same as that in the first. *Held*, that a plea of justification to so much of the words stated in both counts as are printed in italics was bad, the words justified by the plea imputing only acts of harshness and oppression by the plaintiff in his character of agent, while the slander alleged in the declaration imputed the commission of those acts for selfish and personal motives. *C. P. Morrow v. McGaver* 579

21. The defendant having pleaded not guilty to the whole declaration, on which issue was joined, at the trial the Judge directed the jury that they should be satisfied that the words laid in the declaration, or some of them, being of a defamatory character, had been spoken by the defendant; and no objection was taken to his charge in this particular. *Held*, that the plaintiff was estopped from contending that it was sufficient to prove the substance of the words alleged; and it being admitted that there was no sufficient proof of actual words alleged to sustain the action, a *venire de novo* was awarded.

Ibid

22. If the words alleged in the declaration are proved to have been spoken, the fact that they are proved not to have been spoken continuously, as stated in the declaration, will not constitute a variance.

Ibid

23. To an action on a bill of exchange by indorsee against acceptor, the defendant pleaded the general issue,

EVIDENCE.

and a plea that [before the promises were made, and the bill accepted, the defendant was discharged as an insolvent debtor, and that before his discharge he filed a schedule, and that the promises were made, and the bill of exchange was accepted, for and in consideration of the debt contracted before the defendant was so discharged, which debt was set out in the schedule, and for no other consideration. The plaintiff replied *de injuriâ*. Held, that evidence being given that the bill was a renewal bill, given in consideration of a party withdrawing his opposition to the insolvent's discharge, the defendant was discharged from liability thereupon, and that the replication *de injuriâ* was no answer to such plea. Q. B. *Blunden v. Marsh* 608

24. *Semble*—The plaintiff should have replied he was indorsee for valuable consideration without notice. *Ibid*

EXCEPTIONS.

See BILL OF EXCEPTIONS.

EXCHEQUER CHAMBER.

See JURISDICTION, 3.

EXECUTOR.

See PLEADING.

FEE-FARM.

See LANDLORD AND TENANT.
MINES.

FELONY.

See CRIMINAL LAW.
JUSTICE OF THE PEACE.

FIAT.

See AFFIDAVIT, 2.
AMENDMENT, 3.
ARREST, 2.

FIERI FACIAS.

See AMENDMENT, 2.
CAPIAS AD SATISFACIENDUM.
SHERIFF, 2.

GRANT.

FORFEITURE.

See EJECTMENT.

FORGERY.

See CRIMINAL LAW, 8.

FRANCHISE.

See BURGESS.

FRAUD.

See POLICY OF INSURANCE.

FREEHOLDER.

See BURGESS.

FRIENDLY SOCIETY.

See CRIMINAL LAW, 3.
EVIDENCE, 4.

GENERAL ORDERS.

See AFFIDAVIT, 1, 2.
EJECTMENT, 6, 9, 11.
JUDGMENT AS IN CASE OF
NONSUIT.
LIBERTY TO PROCEED.
NOTICE OF TRIAL.
SCIRE FACIAS.
SECURITY FOR COSTS.
SERVICE OF PROCESS.
SETTING ASIDE PROCEED-
INGS, 1.

1. The 255th New General Order applies to cases where there is but one plaintiff in ejectment, as well as several. Q. B. *Stradbroke v. Browne* 90
2. "The rule has the effect of an express legislative enactment; we feel bound to uphold our own Orders, and there being a prescribed form of declaration by the 44th General Order, it must be adopted in all cases. The demurrer must be allowed; but we will permit the plaintiff to amend on payment of costs." Q. B. *Per Blackburne, C. J., in Kelly v. Carroll* 193

GLEBE.

See ECCLESIASTICAL LAW.

GRAND JURY.

See BOND.

GRANT.

See FEE-FARM.

GUARDIAN.

GUARDIAN.

See INFANT.

PLEADING, 35.

HABEAS CORPUS.

See ARREST, 5.

The Court of Exchequer, whether the full Court in Term, or a single Baron in Vacation, have not jurisdiction by *habeas corpus* to discharge a prisoner in custody by process in a civil suit. E. *Page v. Williams* 527

HABERE.

See EJECTMENT.

HOUSEHOLDER.

See BURGESS.

HUSBAND AND WIFE.

See PLEADING, 28.

SET-OFF.

In suing for rent which has accrued due after coverture, upon a demise of the wife's land, made while she was sole, the husband has his election either to sue alone, or to join his wife as co-plaintiff. *Per* PIGOT, C. B. E. *O'Halloran v. Studdert* 248

INCUMBERED ESTATES.

See LEASE, 1.

INDICTMENT.

See CRIMINAL LAW.

INFANT.

See PLEADING, 35.

INHERITANCE.

See ESTATE OF INHERITANCE.

INITIALS.

See PLEADING, 2.

INSOLVENT.

See ARREST, 1.

EVIDENCE, 23.

PLEADING, 39, 40.

INSURANCE.

See POLICY OF INSURANCE.

JUDGMENT.

717

INTEREST.

A sale of growing trees or underwood is a sale of an interest in land. E. *Rhodes v. Baker* 488

INTERLOCUTORY JUDGMENT.

See LIBERTY TO PROCEED.

SETTING ASIDE PROCEEDINGS.

INTERPLEADER.

Where a defendant obtained an interpleader order, staying a plaintiff from proceeding in an action of trover for certain goods, on condition that these goods should be returned to plaintiff and which were in pursuance of such order returned, the plaintiffs were restrained prosecuting another action for the non-delivery of these goods within a reasonable time. Q. B. *Leahy v. Malcomson* 432

IRREGULARITY.

See AFFIDAVIT, 2.

CONDITIONAL ORDER.

JUDGMENT AS IN CASE OF A NONSUIT.

PRACTICE IN PLEADING.

SETTING ASIDE PROCEEDINGS, 1.

SHERIFF.

An irregularity is waived by the opposite party having taken a step in the cause. Q. B. *Doyle v. Callanan* 1

ISSUE.

See WILL.

JUDGMENT.

See AMENDMENT, 1.

COSTS, 2, 3, 4, 5, 6, 7.

OUTLAWRY.

SCIRE FACIAS.

SETTING ASIDE PROCEEDINGS, 9.

1. A motion to include several proceedings in a record before the judgment is made up is premature, and will not be granted. Q. B. *Evans's Charities v. Bank of Ireland* 393
2. Where there had been two trials, and a verdict had on the first trial in favour of the defendants, which verdict was set aside on bill of exceptions

taken to the ruling of the Judge, and a *venire de novo* awarded; and where on the second trial a verdict was had by default in favour of the plaintiffs, the defendants not appearing, and the judgment was made up, omitting the bill of exceptions and award of *venire de novo*; *Held, per Curiam*, a motion to amend the record by introducing therein all the proceedings comprising the pleading up to the first trial, the record and finding of the jury, bill of exceptions, and judgment thereon, was untenable. *Ibid* 408

3. *Held also*, that such judgment was regular, being founded on the *postea* and verdict therein recited; and that the bill of exceptions and the order for the *venire de novo* constituted no part of the record of the final judgment.—[BLACKBURN, C. J., *dissentiente*.] *Ibid*
4. *Held also*, that the statute 28 G. 3, c. 31, contemplates the award of a *venire* as but an order on motion, and therefore an application to incorporate into the judgment the bill of exceptions and the order for a *venire de novo* is untenable.—[BLACKBURN, C. J., *dissentiente*.] *Ibid*
5. *Held also*, that the Court of Exchequer Chamber had no power over the records of the other Courts. *Ibid*

JUDGMENT AS IN CASE OF A NONSUIT.

1. Where a conditional order was obtained for liberty to enter up judgment as in case of a nonsuit, and pending that order the plaintiff served notice of trial and brought down the cause:—*Held*, that this conditional order had not the effect of suspending the proceedings, and that the plaintiff was not irregular in taking down the case for trial. Q. B. *Lessee O'Callaghan v. O'Callaghan* 105
2. *Semble*.—Assuming that it had the effect of suspending the proceedings, the laches of the defendant would prevent his taking advantage of it *Ibid*

3. Where a party gives a peremptory undertaking to go to trial under the 112th New General Order, and fails, order for judgment as in case of nonsuit absolute in the first instance. E. *Courtenay v. Adams* 544

JUDGMENT BY DEFAULT.

See COSTS, 4.

EJECTMENT, 1.

SETTING ASIDE PROCEEDINGS.

In an action of assumpsit on a bill of exchange, when interlocutory judgment obtained by the plaintiff on parliamentary appearance, and final judgment on officer's report, the judgment is a judgment by default, and recovered in an action for liquidated sum within the meaning of the 2nd section of Process and Practice Amendment Act. E. *Miller v. Mawnsell* 66

JURAT.

See AFFIDAVIT, 1.

JURISDICTION.

See ASSISTANT-BARRISTER.

CERTIORARI.

CRIMINAL APPEAL.

EXCHEQUER CHAMBER.

INCUMBERED ESTATES.

JUSTICE OF THE PEACE.

MANDAMUS.

QUO WARRANTO.

1. *Semble*.—Where an order for a *certiorari* had been obtained, and no cause shown against it, it is too late to raise a question of jurisdiction after a return had been made to the *certiorari*. Q. B. *The Guardians of the North Dublin Union v. Scott* 76
2. *Quere*.—Has this Court jurisdiction to question an order made by a Justice or Assistant-Barrister on an appeal against a poor-law rating? *Ibid*
3. The Court of Exchequer has no power over the records of the other Courts. Q. B. *Evans' Charities v. the Bank of Ireland* 408

JUSTICE OF THE PEACE.

See CERTIORARI, 2.

1. Where a charge was preferred before

a Justice of the Peace against a clergyman, for an assault with intent to commit a felony, and the Justice of the Peace reduced the statement into writing, in the form of a declaration, as prescribed by the statute 5 & 6 W. 4, c. 62, and signed it as such Justice, and returned it inclosed in an envelope to the complainant for delivery to the Dean of the diocese according to his request, in order that this declaration might be laid before the Bishop for investigation:—*Held*, that on such a state of facts a question ought to have been left to the jury to say whether the Justice of the Peace acted *bona fide*, and under the belief that he was acting in the execution of his duty, and in a manner within his jurisdiction as such Justice? Q. B. *Little v. Clements* 194

2. *Held also*, that it was for the jury to say whether, under the circumstances, the communication was a privileged communication, and whether the Justice acted *bona fide* and without malice in its publication. *Ibid*
3. *Semble*—If the jury found such facts in the affirmative, the Justice was within the protection of the statute 12 Vic., c. 16, and entitled to notice of action. *Ibid*
4. *Semble*—The 5 & 6 W. 4, c. 62, does not authorise a Justice of the Peace to take a declaration charging a party with a criminal offence. *Ibid*

· LACHES.

See JUDGMENT AS IN CASE OF A NONSUIT.
MANDAMUS.

LANDLORD AND TENANT.

See BURGESS.
COVENANT.
EJECTMENT.
EVIDENCE.
LEASE.
LODGMENT OF MONEY.
PLEADING.
STAMP.

1. A fee-farm grant of 1637 excepted to the grantor, his heirs, &c., all mines and

minerals, with liberty to dig and take away the same. The representative of the grantor erected houses, made tram-roads and formed other works on the lands for the purpose of working a mine, which works were found by the jury necessary and proper for that purpose. *Held*, that under the statute 10 G. 1, c. 5, such works were justifiable; and independently of that statute that under the grant the defendants were authorised in using all modern modes of working the mine, and were not confined to such as were in use at the time of the fee-farm grant. Q. B. *McDonnell v. Kenneth* 113

2. A sale of growing trees or under-wood is a sale of an interest in lands. E. *Rhodes v. Baker* 488

LARCENY.

See CRIMINAL APPEAL.
CRIMINAL LAW.

LEASE.

See COVENANT.
STAMP.

1. By indenture dated the 1st of January 1821, certain premises were demised to S. W., his heirs, executors, administrators and assigns, for the lives of A, B and C, "and for and during the life and lives of the survivors and survivor of them, and for the term of 99 years, whichever should last the longest." *Held*, on a case submitted by the Commissioners for the Sale of Incumbered Estates in Ireland for the opinion of the Court of Common Pleas, that the Commissioners had not jurisdiction under 12 & 13 Vic. c. 77 to sell premises held under such a lease. C. P. *In re Reilly* 41
2. "The legal effect of the present lease is a demise of three lives and so much of the term of ninety-nine years as shall be unexpired at the termination of the three lives. As a freehold interest it is not contended to be within the Act; and as a chattel it is not yet a chattel in possession; nor is it certain in legal contemplation that it

ever will be a chattel of the required duration, and it is therefore not within the Act." *Per* MONAHAN, C. J. *Ibid* 43

3. A power to make leases for any term not exceeding three lives *and* forty-one years. *Held*, that a lease for three lives *and* forty-one years, commencing from the 1st of November preceding the day of the death of the survivor of the *cestui que vies* in the lease, was a valid lease within the meaning of such power. Q. B. *In re Crommelin* 182

4. A lease was executed by A and B as granting parties, and reserved the rent and right of re-entry to A alone. *Held*, that the assignee of the lessee was estopped showing A had no interest in the premises. Q. B. *Lessee Parke v. M'Loughlin* 186

5. Payment of an abated rent for a period of thirty years by a tenant holding under a lease for a term unexpired is, if unexplained, evidence to go to a jury of the surrender of such lease and the creation of a new tenancy at the abated rent; and the effect of such payment is not destroyed by the fact that during part of the time it had been made to a tenant for life with a strict power to lease. C. P. *Lefroy v. Walsh* 311

6. *Semble*—A tenant for life, with power to lease for three lives or thirty-one years, at the best rent, may *toties quoties* accept surrenders of existing leases granted in execution of his power, and create new demises, provided that at the time of their execution they are in conformity with the terms of such power. *Ibid*

7. In an action on a lease by landlord against tenant, the tenant will, on motion, be ordered to produce the lease for the purposes of the action, if it appear that only one part of the lease was executed, and that it is in the tenant's possession. E. *Beasley v. Tyrrell* 365

LIBEL.

See JUSTICE OF THE PEACE.

LIBERTY TO PROCEED.

A plaintiff having obtained interlocutory judgment, and having taken no step in the cause for upwards of two years, the Court granted a rule to proceed on an affidavit, stating he was prevented proceeding by want of means, and in the hope that a compromise would be effected. Q. B. *Crommelin v. Donegal* 244

LIMITATIONS, STATUTE OF.

1. The Court will permit the amendment of writs if justice will be thereby furthered, and the Statute of Limitations would otherwise operate as a bar to the demand. Q. B. *Clanmorris v. Lambert* 519

2. To a bill filed in the Court of Chancery by two of the next-of-kin of A, for the administration of his estate, B, the administrator, by his answer stated that the personal estate was insufficient for the payment of the intestate's debts; and in reply to interrogatories for that purpose set forth an inventory of the outstanding assets and debts; amongst the latter was contained the following entry:—"To amount of a promissory note due to J. S., inclusive of interest, £300." *Held*, in an action by the plaintiff as executor of J. S., on the promissory note, on which there had been no payment of interest for six years before the commencement of this action, that the entry was a sufficient acknowledgement within Lord Tenterden's Act, to take the case out of the Statute of Limitations. C. P. *Spollun v. Magan* 691

LIS PENDENS.

See EVIDENCE.

LODGMET OF MONEY.

1. A declaration in debt contained a special count, and also counts for use and occupation, and on an account stated. The special count averred the execution of a lease by P. W.

LODGMET.

to J. D., the assignment of it to the defendant, and the descent of the reversion on the plaintiff, and that one and a-half year's rent was in arrear. The common counts related to other lands which the defendant held under an accepted proposal. The defendant pleaded *nil debet*, and paid money into Court generally. *Held*, that the defendant was not at liberty to apply such payment to any particular count of the declaration, but that it admitted his liability upon all. C. P. *Lyster v. Odum* 52

2. The plaintiff having given notice to show the amount of rent due out of the premises comprised in the first count:—*Held*, that he did not thereby preclude himself from relying on the defendant's admission by payment of money into Court. *Ibid*

3. A party will not be allowed to lodge money after plea pleaded, and notice of trial served. Q. B. *Officers of Ordnance v. Reardon* 89

4. An action brought for rent against the defendant, holding two denominations of lands, P. and C., the defendant lodged in Court the rent due for P. (having a defence for the rent of C.) before the declaration filed. The plaintiff declared for the rent due for C. alone. On application of defendant, the money lodged was ordered to be paid to plaintiff for the rent of P., and the lodgment not to be given in evidence at the trial. E. *Castle v. Keane* 485

LODGER.

See BURGESS.

"The occupation of a lodger is the occupation of a householder, and the letting of lodgings does not render the householder less an occupier." Q. B. *Per* PERRIN, J. *Wauchob v. Reynolds* 145

LORD MAYOR.

See MANDAMUS.

MAGISTRATE.

See JUSTICE OF THE PEACE.

MANDAMUS.

721

MANDAMUS.

1. A Railway Company is not bound to carry a mail guard with bags at the same rate as an ordinary passenger; and before the Postmaster-General can compel a Railway Company to carry such mail bags, a privity must exist between them by the execution of a special contract. Q. B. *The Queen v. The South Eastern Railway Company* 29

2. A, being tenant for life of certain lands held under a lease for lives renewable, was served with a notice to treat by a Railway Company, and thereupon a memorandum of agreement, signed and sealed by A, but not by the Company, was entered into, by which the Company agreed to pay £1250 to A, and that a jury should be summoned at the instance of the Company to find a verdict for that amount. The Company entered into possession of the lands, and executed certain of their works, but neither summoned the jury, nor paid the money. *Held*, that in such a case a mandamus would be granted to summon a jury, and that it was no valid return to such mandamus to say that such agreement was binding on the Company, and that it could be enforced in equity, they having acted on it. Q. B. *Dunne v. The Irish South Eastern Railway Company* 119

3. A peremptory order for a mandamus will not be granted without notice to the opposite party; nor in a case where the prosecutor has lain by for a long period. Q. B. *Wauchob v. Reynolds* 157

4. A, having been elected a Town-councillor and Lord Mayor of the borough of D., his name was, after he had been so elected, erased by order of this Court from the burgess-list of the borough of D., as not being entitled to remain on the roll. *Held*, a mandamus was the proper mode of proceeding to try the right of A to the office of Lord Mayor, and that the Court would not adopt the cir-

cautious course of proceeding by *quo warranto*, the office being void.—
[PERRIN, J., *dissentiente*.] *Ibid* 158

5. *Semble*, the proceeding given by the 3 & 4 Vic. c. 108, by appeal, to have a party's name erased from the burgess roll as being disentitled to be thereon, is substituted for a *quo warranto*; and an order of the Court, erasing a party's name from the burgess-roll, has a retrospective effect, and renders the office void *ab initio*.

Ibid

6. A burgess was elected Lord Mayor of the borough of D., and by order of this Court his name was expunged from the burgess-roll, and a mandamus issued to the Council of the borough to elect a person in his room; thereupon a return was made to the writ, which stated his election to and continuance in the office of Lord Mayor, and that the office was full, and that his election was not set aside, annulled or avoided. *Held*, that this Court had jurisdiction to quash this return, but that it was not a fit case in which the discretionary power of the Court should be exercised, the return not being frivolous. Q. B. *The Queen v. Reynolds* 170

7. *Held*, on demurrer, that this return was bad. *Ibid*

MASTER AND SERVANT.

A car proprietor brought an action for damages sustained by a vehicle of the plaintiff, in consequence of some rubbish having been brought out of the house of the defendant and left in the street opposite his dwelling-house by a person employed by the defendant to remove the rubbish. The jury having found that the service for which the man was employed was to remove the rubbish entirely; *Held*, that this was but the ordinary duty of a servant, and not done as a contractor, and that the defendant was liable. Q. B. *M'Keon v. Bolton* 377

MINES.

A fee-farm grant of 1637 excepted to

the grantor, his heirs, &c., all mines and minerals, with liberty to dig and take away the same. The representative of the grantor erected houses, made tram-roads and formed other works on the lands for the purpose of working a mine, which works were found by the jury necessary and proper for that purpose. *Held*, that under the statute 10 G. 1, c. 5, such works were justifiable; and independently of that statute, that under the grant the defendants were authorised in using all modern modes of working the mine, and were not confined to such as were in use at the time of the fee-farm grant. Q. B. *M'Donnell v. Kenneth* 113

MISDEMEANOUR.

See CRIMINAL LAW.
EVIDENCE.

MISNOMER.

See AMENDMENT, 1, 3.
ARREST.
PLEADING.

MONEY.

See LODGMENT OF MONEY.

MOTION.

See AFFIDAVIT.
COSTS.
PRACTICE.

MUNICIPAL CORPORATION.

See BURGESS.

NAME.

See MISNOMER.

NONSUIT.

Where a defendant is misled, and a non-suit was had in ejectment without a trial, on the merits, the Court set aside the nonsuit on payment of the costs of the trial by the defendant. Q. B. *Lessee O'Callaghan v. O'Callaghan* 106

NON PROS.

See JUDGMENT.

A defendant having entered and served the rule for judgment of *non pros*, before the expiration of six months from the date of his appearance, may

NOTICE.

mark judgment pursuant thereto at any time within the year from the service of such rule. C. P. *O'Brien v. Kelly* 342

NOTICE.

See EJECTMENT.
MANDAMUS.

NOTICE OF ACTION.

See JUSTICE OF THE PEACE.

NOTICE OF TRIAL.

See JUDGMENT AS IN CASE OF A
NONSUIT.

LODGMET OF MONEY.

A rule entered pursuant to the 135th General Order is irregular, if the affidavit of the facts has not been filed, previous to the entry of the rule. The plaintiff having served notice of trial, before the Consolidated Court of Nisi Prius, in a case which that Court was not authorised to try, and which was struck out by the Judge on that ground—

Semble—The defendant was entitled to enter a rule under the 135th General Order, that the plaintiff should pay the costs of such notice of trial, and that the proceedings be stayed, the plaintiff not having proceeded to trial in pursuance of his notice. C. P. *Smith v. Waldron* 627

NOTICE TO QUIT.

See EJECTMENT, 8.
EVIDENCE, 16.

OCCUPATION.

See BURGESS.
RATING.

ORDER.

See CONDITIONAL ORDER.
GENERAL ORDER.

OUTLAWRY.

Where a defendant had been outlawed and an order had been made on the application of the plaintiffs to substitute service of a writ of summons on him by serving his agent, the defendant is entitled to enter an appearance to the writ so substituted, notwithstanding the judgment of out-

PLEADING.

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lawry was unreversed. Q. B. *Cranstons v. Fitzgerald* 3

OYER.

A plea purporting to set out a deed *verbatim* without craving oyer, *Held* bad on special demurrer. Q. B. *Luttrell v. M'Creery* 24, n.

PAUPER.

An administratrix beneficially interested in the assets may sue *in forma pauperis*. E. *Sheeran, Administratrix, v. Saul* 67

PEER.

Peers not exempt from making affidavit in the usual way when a proceeding is taken by them in an action at law. E. *Deegan v. Marquis of Waterford* 63

PENALTY.

See PLEADING.

PLEA.

See LODGMET OF MONEY.
PLEADING.

PLEA OF CONFESSION.

See COSTS.

Where in an action of debt a plea of confession was of such a form that judgment could not be entered thereon, and the defendant refused to give a consent for judgment, the Court ordered that a plea of the general issue that had been filed be set aside and judgment entered for the plaintiff. E. *Cowan v. Walker* 68

"I think it is a mistake to say that judgment cannot be entered on a plea of confession in an action of debt as well as of assumpsit, although the usual practice is to have a consent for judgment in an action of debt." *Per* PENNEFATHER, B. *Ibid*

PLEADING.

See COSTS.

CRIMINAL LAW.

EVIDENCE, 7, 8.

MANDAMUS.

POLICY OF INSURANCE.

RAILWAY COMPANY.

SETTING ASIDE PROCEEDINGS.

Generally.

1. In an action of debt for tithe rent-charge, the venue is transitory. Q. B. *Galway v. O'Meagher* 235

Declaration.

2. A declaration on a guarantee stated that one *Jane C. Duffy* was indebted, &c., without alleging any reason for not setting out the name in full, or any averment that it was unknown to the plaintiff. *Held*, on special demurrer, sufficient. Q. B. *Insole v. Farrell* 24

Gawley v. M'Donel 26

3. A declaration in its commencement did not state whether the plaintiff sued in person or by attorney. *Held*, on special demurrer, that such mode of declaring was bad, and that in all cases the form prescribed by the 44th Rule must be followed. Q. B. *Kelly v. Carroll* 192

4. The plaintiffs, holding premises under a lease, containing a covenant to keep and maintain the same in tenable order and condition, demised the premises to the defendants as tenants from year to year. During the tenancy of the defendants an accidental fire broke out, and the premises were destroyed. *Held*, that an action on the case in the nature of waste was not maintainable against the defendants, the jury having found there was no default on their part. Q. B. *White v. M'Cann* 205

5. *Semble*.—Fire not occasioned by negligence is not waste; and when an injury is merely the result of accident, without neglect, the waste therefrom resulting is not permissive.

6. In an action of debt for tithe rent-charge, the declaration averred that the defendant had in the lands an estate of inheritance within the meaning of the Act of Parliament (1 & 2 Vic. c. 109), under which and derived wherefrom there was not any such estate of inheritance, or other estate

or interest as in and by the Act is defined to be a perpetual estate or interest for the purposes of said Act. *Held*, bad on demurrer, as the count should have expressly negatived all the exceptions contained in the Act of Parliament. Q. B. *Galway v. O'Meagher* 235
Black v. Howly 241

7. In such action the venue is transitory. *Ibid*

8. The first count of a declaration in slander stated that the plaintiff was appointed by the Guardians of the Poor of the Union of O. to be relieving-officer of the electoral division of C., and that he had acted as such for the electoral division of C. within the said Union; that the defendant, contriving to cause it to be believed that the plaintiff was guilty of theft and wilful misconduct in his office of relieving officer as aforesaid, in a discourse of and concerning the plaintiff, and of and concerning the plaintiff in the exercise of his said office of relieving officer, spoke and published of and concerning the plaintiff, and of and concerning the plaintiff in the exercise of his said office of relieving-officer, these false, &c., words; "You" (meaning the plaintiff) "robbed the parish of C." (thereby meaning that the plaintiff, whilst he was such relieving-officer, wilfully and corruptly, and in violation of his duty as such relieving-officer, caused persons to receive relief out of the rates levied for the relief of the poor of the parish of C. within the said Union, who were not proper subjects for or entitled to relief). The second count, with a similar statement of the subject of the discourse and of the words alleged to have been spoken, set out the slander as follows:—"You" (meaning the plaintiff) "are a common robber." "You" (meaning the plaintiff) "robbed the parish" (meaning the parish of C., thereby meaning that the said plaintiff, whilst he was such relieving-officer, and in exercise of his office as such relieving-

officer, wilfully, knowingly and corruptly and in violation of his duty as such relieving-officer, caused and enabled persons to receive relief out of the *property* of the said Union who were not proper subjects to receive such relief, and thereby caused a larger rate for the relief of the poor to be levied off the said parish than otherwise would have been.) The slander alleged in the third count was in the same words as that in the first, and the innuendo the same as in the second, except that for the words "caused and enabled persons to receive relief out of the *property* of the said Union" were substituted the words "gave relief to persons out of the *fund* of the said Union." *Held*, that the above counts of the declaration were bad, for not averring that the parish of C. was comprised in the electoral division of C., and that the statement in the innuendo to the first count, that the parish of C. was within the said Union of O., could not be considered as an independent averment of that fact so as to sustain that count of the declaration. C. P. *M'Manus v. M'Enroe* 332

9. In an action of debt on a civil-bill decree, the declaration is sufficient if it show that the plaintiff claimed by his process a sum within the jurisdiction of the Assistant-Barrister, although the cause of action may have exceeded it. C. P. *Palmer v. Robinson* 354

10. A declaration in first count averred that the defendant was indebted to the plaintiff as executor, for use and occupation of certain lands of the plaintiff as such executor, and the second count was on an account stated with the plaintiff as executor. *Held* bad on general demurrer for misjoinder, and also on special demurrer for not averring profert. E. *Executor Gorman v. Fitzgerald* 359

11. A bond was made to A B and C D. "paid officers duly appointed for the purpose of carrying into execution, within the Waterford Union" the

provisions of the Poor-law Act; and the recital in the condition of which bond required the money to be paid to them, their attorney, successors or assigns. The Guardians of the Union declared on this bond by their corporate name; *Held*, on demurrer, that they were not entitled to sue in their corporate capacity. Q. B. *Guardians of the Waterford Union v. Walsh* 370

12. A declaration for calls stated that the action had accrued to the Company by virtue of the Companies Clauses Act, "and also by virtue of a certain Act of Parliament," made and passed in the 9 & 10 Vic. The Company were incorporated under 9 & 10 Vic. c. 208, and subsequently obtained an amended Act, empowering them to abandon part of their undertaking. *Held*, on motion in arrest of judgment, that it was not necessary to specify the second Special Act in the declaration. Q. B. *Waterford Railway v. Wolsely* 452

13. *Quære*, would such declaration be good on demurrer? *Ibid*

14. If words alleged in a declaration of libel are proved to have been spoken, the fact that they were proved not to have been spoken continuously, as alleged in the declaration, will not constitute a variance. C. P. *Morrow v. M'Gaver* 579

13. The declaration in ejectment, under 13 Vic., c. 18, should include the names of all persons served with the writ of summons. C. P. *Eyre v. Hallanan* 629

Subsequent Pleading.

16. A declaration stated an indenture of 1792, which contained a covenant for renewal on the death of the *cestui que vies* and the survivors of them, on payment of a peppercorn fine, and that the nominated life was to be indorsed on the indenture or on a separate deed, label or parchment. It then alleged the death of one of the *c. q. vies*, and that by an indenture of 1818, under the hand and seal of

plaintiff and defendant, reciting the indenture of 1792, and that all the estate and interest of the lessor in that lease vested in plaintiff, and the estate of the lessee in the defendant, and that the defendant had applied for a renewal of the indenture of 1792 by inserting the life of D., and that plaintiff, in pursuance of that covenant, added and inserted said life, *Habendum* for the three lives and the survivor, and such other life, &c., "subject to the rent and all the other covenants in the indenture of 1792 contained on the lessee's part to be done and performed."

The declaration then averred a covenant by the defendant to pay the rent, the existence of the term, and that the rent accrued due, and non-payment. The defendant cravedoyer, and pleaded that before the rent became due, the defendant, by an indenture therein mentioned, assigned his interest in the premises; that the assignee entered, and that the plaintiff after the entry received rent from the assignee, and accepted him as his tenant.

Held, on general demurrer, that such plea was bad, the reference by the deed of 1818 to the deed of 1792 incorporating all the covenants in the deed of 1792, and the deed of 1818, containing the words "subject to the said yearly rent of £40 sterling," raised an express covenant to pay the rent, and that such covenant was obligatory on the defendant after his assignment over.—[*CRAMPTON, J., dissentiente.*] Q. B. *Luttrell v. M'Creery* 7

17. "A covenant for renewal means that the tenant is to have at all times a subsisting legal estate for three lives and the life of the survivor, and that the landlord is to have all his legal remedies for the recovery of the rent, and that the deed of 1818 operated as a valid lease and re-lease, and that a legal estate was created for a term of three lives and the life of the survivor."—[*Per MOORE, J.*] *Ibid*

18. *Held, per CRAMPTON, J.*, that no new estate was, or intended to be, created by the deed of 1818; that the intention was to continue the old estate by way of enlargement, and leave the relation of landlord and tenant as it stood before. *Ibid*

19. *Held also, per CRAMPTON, J.*, that if the true construction of the deed of 1818 were that it created a new estate in the tenant, and operated as a surrender of the lease, the declaration should have only averred the creation of the estate for three lives, the covenant to pay the rent, and its breach. *Ibid*

20. A plea purporting to set out a deed *verbatim*, without cravingoyer, is bad on special demurrer. *Ibid* 24, n.

21. To an action of covenant brought by lessor against executor of lessee for a year's rent, due 1st of November 1849, the defendant pleaded that the testator had assigned the premises to A in 1838 for the residue of the term; that A thereupon entered and became possessed, and whilst in possession was evicted by title paramount, on an ejectment brought by B, in March 1850, by the procurement of the plaintiff, in which the fictitious demises were stated to have been made on the 1st of November 1849. *Virtute cuius*, A became a trespasser by relation as against the feigned lessee and the lessors of the plaintiff in ejectment, in regard of the possession of the lands, as from a time before the rent became due.

Held, that the plea was bad on demurrer, in not showing an eviction by title paramount before the rent became due. Q. B. *Hoey v. Coffey* 107

22. *Held*, that the plea stating the demises to have been laid on the 1st of November, the Court were not bound to infer that they commenced on the first hour of that day, and therefore the plea failed to establish title on that day. *Ibid*

23. Bond of pay clerk to Commissioners of Public Works, conditioned

(*inter alia*) from time to time when so required, to account in writing for all moneys, &c.; and also make good answer for and pay the moneys due on the balance of such account to the said Commissioners, &c.

In an action on the bond, replication stated as a breach, that although defendant had accounted, and a large sum was due on balance of such account, yet the defendant did not make good answer for or pay the balance, &c.

Rejoinder—that defendant paid part of said balance and made good answer for the residue thus, that he was necessarily travelling on the public way in discharge of his duty, with such residue on his person, when the same was violently and feloniously stolen and taken from him, &c.

Held, on general demurrer, that the acts of strangers to the bond could not discharge the obligor. *E. Hornsby v. Slack* 126

24. A plea, that the defendant became a bankrupt after the accrual of the supposed causes of action in the declaration mentioned, *if any such there be*; *Held*, bad on special demurrer, as neither avoiding or confessing the debt.—[CRAMPTON, J., *dissentiente*.] *Q. B. Frazer v. Blake* 179

25. To an action of covenant by administratrix of lessor against lessee, defendant (*inter alia*) pleaded that one G. H. was the owner of the premises for the term mentioned, and that the lessor after his death became possessed thereof as his executor, and was so possessed to the time of making the indenture; that the lessor died intestate, and that plaintiff was his administratrix, and that M. L. obtained *administration de bonis non* to G. H. *Held*, bad on special demurrer, the defendant being estopped by his covenant to pay the rent, denying that plaintiff was entitled to maintain the action. *Q. B. Crawford v. Whearty* 222

26. A declaration in covenant by ad-

ministratrix of the lessor against assignee of lessee, stated that one E. K., being possessed of the demised premises for the remainder of a term of years, of which sixty and upwards were unexpired, by indenture demised the same to defendant, who covenanted to pay the rent; that E. K. died, and letters of administration of the goods of E. K. were granted to the plaintiff, by reason whereof he became and was and still is possessed of the reversion.

Plea—That E. K. had nothing in the premises except through R. K. deceased, and that before E. K. was possessed, the said R. K. was possessed for the residue of the term, and so continued up to and at his death; and being so possessed, R. K. died, and letters of administration were granted to E. K., whereby E. K., as administratrix and not otherwise, became and was possessed of the premises, and so continued up to and at the making of the indenture, and that she died, and all her estate and interest thereby determined.—*Held*, a bad plea, the averment as to the determination of the term and estate being repugnant to law, and being further defective in not averring there was any *administration de bonis non*. *Q. B. Kelly v. Shaw* 225

27. *Held*, that the plaintiff as administratrix was entitled to maintain the action, even though E. K. had the term as administratrix, there being an express covenant to pay the rent, which runs with the land, and binds the assignee of the lease. *Ibid*

28. Rent due by the husband individually cannot be set off against rent due to the husband in right of his wife. *E. O'Halloran v. Studert* 245

29. Replevin, for taking the plaintiff's goods in the parish of M., in a certain close called T.; the defendant avowed the taking in the *locus in quo*, because the defendant held said close called T., in the parish of M., as

his tenant, at a yearly rent, for the arrears of which he distrained. The plaintiff pleaded in bar that he did not hold the said close called T. in the parish of M., *modo et forma*. At the trial it appeared that the close in question was situated in the parish of C. *Held*, firstly, that the plaintiff was not estopped from showing that the lands of which he was tenant were situated in the parish of C.; secondly, that the averment in the avowry of the parish in which the lands of T. so held were situated was material, and the variance fatal.—
C. P. *Uniacke v. Kirwan* 316

30. To a count in trespass for seizing, taking and distraining the plaintiff's goods and chattels, and impounding them, *per quod* they were damaged; the defendant pleaded that the plaintiff held a certain dwelling-house as his tenant, and that he took, seized and distrained the goods, &c., therein as a distress for rent. Plaintiff replied *de injuria*. *Held*, first, that the replication was bad, as putting in issue the defendant's title to the dwelling-house. Secondly, that the plea was bad for not showing that the defendant had before making the distress complied with the requisites of the statute 9 & 10 Vic. c. 111, s. 10.
C. P. *Madden v. Bryan* 322

31. *Semble*—An averment that the defendant distrained for rent in arrear does not put in issue the legality of the distress. *Ibid*

32. The first count of a declaration in slander stated that the plaintiff was appointed by the Guardians of the Poor of the Union of O. to be relieving-officer of the electoral division of C., and that he had acted as such for the electoral division of C. within the said Union; that the defendant, contriving to cause it to be believed that the plaintiff was guilty of theft and wilful misconduct in his office of relieving-officer as aforesaid, in a discourse of and concerning the plaintiff, and of and concerning the plaintiff in the exercise of his said office of

relieving-officer, spoke and published of and concerning the plaintiff, and of and concerning the plaintiff in the exercise of his said office of relieving-officer, these false, &c., words, "You" (meaning the plaintiff) "robbed the parish of C." (thereby meaning that the plaintiff, whilst he was such relieving-officer, wilfully and corruptly, and in violation of his duty as such relieving-officer, caused persons to receive relief out of the rates levied for the relief of the poor off the parish of C. within the said Union, who were not proper subjects for or entitled to relief). The second count, with a similar statement of the subject of the discourse and of the words alleged to have been spoken, set out the slander as follows:—"You" (meaning the plaintiff) "are a common robber." "You" (meaning the plaintiff) "robbed the parish" (meaning the parish of C., thereby meaning that the said plaintiff, whilst he was such relieving-officer, and in the exercise of his office as such relieving-officer, wilfully, knowingly and corruptly, and in violation of his duty as such relieving-officer, caused and enabled persons to receive relief out of the property of the said Union who were not proper subjects to receive such relief, and thereby caused a larger rate for the relief of the poor to be levied off the said parish than otherwise would have been). The slander alleged in the third count was in the same words as that in the first, and the innuendo the same as in the second, except that for the words "caused and enabled persons to receive relief out of the property of the said Union" were substituted the words "gave relief to persons out of the fund of the said Union." The defendant pleaded separately to each of the above counts that the plaintiff, whilst he was employed as such relieving-officer, received fifty bags of meal, of the goods and chattels of the Guardians of the Poor of the said Union, and wilfully misapplied them, *contra formam statuti*. *Held*, that

the pleas were bad, for not justifying the words alleged in the sense attributed to them by the innuendos in the declaration. C. P. *M'Manus v. M'Enroe* 332

33. A plea of justification to a declaration in slander must justify the words alleged to have been spoken in the sense attributed to them by the plaintiff's innuendos. *Ibid*

34. To an action of covenant against the heir, on a covenant by his ancestors, for himself, his heirs, executors, administrators and assigns, the defendant pleaded that he hath not, nor at the commencement of this suit, nor at any time before or since, had any lands, &c., by hereditary descent in fee-simple, from his ancestor the covenantor. *Held*, on special demurrer, to be bad, for omitting to negative that the defendant had estates *pur autre vie* by descent from the covenantor. C. P. *Fitzgerald v. Fitzgerald* 347

35. To an action of debt for Railway calls, the defendant pleaded that at the time of the making of the said supposed contract in the declaration mentioned he was an infant; *Held*, on special demurrer, that the plea was informal, no contract being stated in the declaration; and that consistently with the language of the plea, a case might exist in which the liability would not arise solely from contract. Q. B. *Midland Railway v. Quinn* 383

To a second action for calls, the defendant pleaded by his guardian that before the calls were made and before the registry of any person as a shareholder, the defendant had bought the shares from different persons; but before the defendant was registered as holder of them, and before the calls, an agreement was made between him and the plaintiffs, whereby, in consideration of his undertaking to pay all the calls, the plaintiffs promised to place his name on the register, and in pursuance of the agreement they did place his name on the register; that he was and is an infant, and that he

has not at any time derived, nor does he seek to derive, any benefit or advantage from the shares. *Held*, on special demurrer that the plea was bad, in not showing an entire abandonment of all interest in the subject-matter of contract *Ibid*

36. To a declaration for penalties the defendant pleaded a prior action pending against him for the same penalties at suit of another informer; the plaintiff replied that the writ of summons and declaration in the former action were sued out and filed by the plaintiff therein by fraud and covin, contrary to the statute. *Held*, that the statute 4 *Hen. 7*, c. 20, did not apply to the case of a plea of a prior suit pending, but only to cases of judgments recovered, and to bars by final proceedings, and therefore that the replication was not warranted by that statute. Q. B. *Pounds v. Carr* 599

37. *Held also*, that such replication was bad at Common Law on special demurrer *Ibid*

38. *Held also*, that the present action being a penal one, the defendant was not within the 6 *Anne*, c. 10, entitled to plead double matter *Ibid*

39. To an action on a bill of exchange by indorsee against acceptor, the defendant pleaded the general issue, and a plea that before the promises were made, and the bill accepted, the defendant was discharged as an insolvent debtor, and that before his discharge he filed a schedule, and that the promises were made, and the bill of exchange was accepted, for and in consideration of the debt contracted before the defendant was so discharged, which debt was set out in the schedule, and for no other consideration. The plaintiff replied *de injuriâ*. *Held*, that evidence being given that the bill was a renewal bill, given in consideration of a party withdrawing his opposition to the insolvent's discharge, the defendant was discharged from liability there-

upon, and that the replication *de injuriâ* was no answer to such plea.

Q. B. *Blunden v. Marsh* 608

40. *Semble*—The plaintiff should have replied he was indorsee for valuable consideration without notice *Ibid*

41. To an action of trespass, *quare clausum fregit*, the defendant pleaded the recovery of a judgment against the plaintiff and another, and the issuing of a *fi. fa.* on foot thereof, and justified under this *fi. fa.* The plaintiff replied that by an order of the Insolvent Debtors' Court, the plaintiff, then being an insolvent debtor in custody, and a prisoner in the gaol of, &c., was duly discharged according to 3 & 4 Vic. c. 107, of and from the judgment debt and damages in the plea mentioned, which order and discharge still remained in full force. —*Verification*.—*Held*, on special demurrer, that the replication was bad, for not showing how the plaintiff was discharged from the judgment, or how he was entitled to relief under the Insolvent Debtors' Act, or that he had taken the proper steps to entitle him to be discharged. Q. B. *Jackson v. Mercer* 624

42. *Quere* is such actionable? *Ibid*

43. To a count in trespass for breaking and entering the plaintiff's close on the 25th of October 1850, the defendants pleaded that *before the said time when, &c., to wit on the 24th of October 1850*, the plaintiff was seised in his demesne as of fee of the said close; and being so seised, *afterwards, to wit on the day and year last aforesaid, and before the time, &c.*, demised the said close to the defendant J. M., his executors, administrators and assigns, for one year certain, and thenceforward from year to year as long as should be agreed upon; *virtute cujus* the defendant J. M. *afterwards, to wit on the day and year aforesaid, entered and became and was possessed thereof for the term aforesaid, wherefore the said J. M., in his own right, and the other*

defendants as his servants, *broke and entered* the said close, &c., *quæ sunt eadem*. *Held*, that the plea was bad as amounting to the general issue. C. P. *De Bathe v. Martin* 657

PRACTICE IN PLEADING.

See DEMURRER.

1. A declaration in debt contained a special count, and also counts for use and occupation, and on an account stated. The special count averred the execution of a lease by P. W. to J. D., the assignment of it to the defendant, and the descent of the reversion on the plaintiff, and that one and a-half year's rent was in arrear. The common counts related to other lands which the defendant held under an accepted proposal. The defendant pleaded *nil debet* and paid money into Court generally. *Held*, that the defendant was not at liberty to apply such payment to any particular count of the declaration, but that it admitted his liability upon all. C. P. *Lyster v. Odium* 52
2. The plaintiff having given notice to show the amount of rent due out of the premises comprised in the first count, *Held*, that he did not thereby preclude himself from relying on the defendant's admission by payment of money into Court *Ibid*
3. Where in an action of debt, a plea of confession was of such a form that judgment could not be entered thereon, and the defendant refused to give a consent for judgment, the Court ordered that a plea of the general issue that had been filed be set aside and judgment entered for the plaintiff. E. *Cowan v. Walker* 68
4. When a declaration had been filed, varying from the common form prescribed by the New General Orders, the Court will not make an order deeming it good; but will allow the plaintiff to take it off the file, paying any costs incurred by the defendant. Q. B. *Simcocks v. Duff* 86
5. The Court will allow a declaration

- to be filed varying from the form prescribed by the General Orders. Q. B. *Magrath v. M'Intyre* 88
6. Where there is but one plaintiff in ejectment, it is no ground for an application to vary from the form prescribed by the General Orders. Q. B. *Lord Stradbroke v. Brown* 90
7. In an action by payee against maker of a note, made payable in the body of it at a particular place, the form in schedule to General Orders is inapplicable, as presentment is necessary to be averred, and liberty will be given to depart from form in schedule, and costs of the motion. E. *Daly v. Cotsman* 137
8. Where a plea bore date 5th February 1851, omitting the words "in the year of our Lord," such omission is no ground for setting aside the plea for irregularity. Q. B. *Howard v. M'Nevin* 193
9. Where a demurrer is taken to a declaration containing two counts, one of which is good and the other bad, the demurrer will be overruled as being too large. Q. B. *Spearing v. Hamilton* 243
10. *Semble*—On the argument of a demurrer to the defendant's pleas, it is not necessary, to entitle the defendant's Counsel to argue objections of general demurrer to the declaration, that they should have been noted in the demurrer books. C. P. *M'Manus v. M'Enroe* 332
11. Where the defendant demurs to the copy of the declaration served pursuant to the 13 Vic. c. 18, and it afterwards appears that the copy does not correspond with the declaration on the file, and that the grounds of demurrer do not apply to the latter, the Court will permit the demurrer to be withdrawn. And *Semble*—If the Court are satisfied that the defendant's attorney was not aware of the variance at the time of filing the demurrer, they will compel the plaintiff to pay the costs occasioned by his mistake. C. P. *O'Connell v. Unthank* 352
12. On the argument of a demurrer to a declaration the Court must give judgment according to the declaration on the file, and not according to the copy served, pursuant to the 13 Vic. c. 18; although if the defendant have been induced to demur in consequence of having been served with an erroneous copy of the declaration, the Court may compel the party in default to amend, and pay the costs occasioned by his mistake. C. P. *Palmer v. Robinson* 354
13. In an action by drawers against acceptors of a bill of exchange, the acceptors being a partnership, the surviving member of which was a lady who had, since the bill was accepted, married:—*Held*, the common form of declaration was not sufficient, and leave to vary therefrom was granted. Q. B. *Comyns v. Dalgleish* 495
14. A declaration for work and labour by two surviving contractors, on a cause of action vested in three, contained a count for interest, and was signed by Counsel. *Held*, that such declaration would not be set aside as irregular. Q. B. *Reilly v. Guinness* 565
15. In an ejectment for non-payment of rent, where the attorney acting for one defendant had by mistake included in his plea other defendants for whom he was not authorised to appear, the Court permitted the plea to be amended without an affidavit of merits. C. P. *Trench v. Hinds* 655

POLICY OF INSURANCE.

A policy of insurance, effected on the life of A, contained a recital, that A was a nurseryman and had warranted, and did thereby warrant, several matters, therein particularly specified, respecting his age, profession, state of health, and mode of life; and also contained a proviso, that if A should die upon the high seas, or *felo de se*, &c., or if any thing so warranted as

aforesaid should not be true, or if any circumstance material to the insurance should not have been truly stated, or should have been misrepresented or concealed, or should not have been fully and fairly disclosed and communicated to the Company, or if any fraud should have been practised upon the Company, or any false statement made to them in or about the obtaining or effecting of the insurance, the policy should be void, and all moneys paid on account thereof forfeited.

A declaration in assumpsit on this policy, after setting forth the policy, its consideration, and the promise by the Company, averred that the statements of the matters warranted [setting them forth *seriatim*] were true, and that there was not any circumstance material to the insurance mis-stated or misrepresented, or concealed, or not justly and fairly disclosed, and that there was not any fraud practised on the Company, or any false statement made to them in or about the effecting of the policy, and concluded in the usual form. At the trial a proposal, executed by A prior to the execution of the policy, was proved, which contained several queries put to A, and his answers thereto; and at foot thereof was an agreement that the particulars therein mentioned, and which might be stated by A, should form the basis of the contract between A and the Company; and if there was any fraudulent concealment or untrue allegation contained therein, or any circumstance material to the insurance should not have been fully communicated to the Company, or there should be any fraud or mis-statement, all money which should have been paid on account of the insurance should be forfeited, and the policy void.

Held, that the proposal was no part of the contract.

Held also, that according to the true construction of the contract between

PROHIBITION.

the parties, a statement made in or about the obtaining of the policy must be not only false, but also material to the insurance, in order to vitiate the policy, and that the question of materiality was properly left to the decision of the jury. *Ex. Ch. Anderson v. Fitzgerald* 251

[*Dissentientibus* MONAHAN, C. J., PIGOT, C. B., and JACKSON, J.] *Ibid*

POOR LAW.

See BURGESS.

PLEADING.

REGISTRY APPEALS.

A house occupied by, or in the possession of a caretaker, is not liable to be rated for the relief of the poor. *Q. B. The Guardians of North Dublin Union v. Scott* 76

POSTEA.

See AMENDMENT, 5.

JUDGMENT, 2.

POST-OFFICE.

See MANDAMUS.

RAILWAY COMPANY.

POWER.

See LEASE, 3, 5, 6.

PRACTICE.

See Respective Titles.

PRIVILEGED COMMUNICATION.

See EVIDENCE, 6.

JUSTICE OF THE PEACE.

PROCESS.

See SERVICE OF PROCESS.

PROCESS AND PRACTICE.

See COSTS.

SETTING ASIDE PROCEEDINGS.

PROCLAMATION.

See CRIMINAL LAW.

PROFERT.

See PLEADING.

PROHIBITION.

An order for a prohibition will not be

PROPOSAL.

granted, unless there be a suggestion or affidavit filed as ground for the order. Q. B. *Harte v. Byrne* 557

The certificate directed by 10 W. 3, c. 6, s. 1, entitling an ecclesiastical person to recover from his successor a portion of the sum expended in the improvement of a glebe, although granted after the death of the party making the improvements, is valid *Ibid*

PROPOSAL.

See POLICY OF INSURANCE.

QUASHING PROCEEDINGS.

See MANDAMUS.

QUO WARRANTO.

See MANDAMUS.

1. *Semble*, the proceeding given by the 3 & 4 Vic. c. 108, by appeal, to have a party's name erased from the burgess-roll as being disentitled to be thereon, is substituted for a *quo warranto*, and an order of the Court, erasing a party's name from the burgess-roll, has a retrospective effect, and renders the office void *ab initio*. Q. B. *Wauchob v. Reynolds* 158
2. Where at a municipal election for the office of Alderman, votes not properly entered on the burgess-roll had been received and recorded, with the assent of a burgess who was canvassing for the office:—*Held*, that by his assent to the reception of such votes he thereby disqualified himself from objecting to their legality on an application for an information in the nature of a *quo warranto*. Q. B.—*The Queen v. M'Mahon* 218

RAILWAY COMPANY.

See EJECTMENT, 3.

EVIDENCE, 17.

MANDAMUS.

A Railway Company is not bound to carry a mail guard with bags at the same rate as an ordinary passenger; and before the Postmaster-General can compel a Railway Company to carry such mail bags, a privy must

REGISTRY.

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exist between them by the execution of a special contract. Q. B. *The Queen v. The Irish South Eastern Railway Company* 29

RECEIPT.

See FORGERY.

RECORD.

See EVIDENCE, 1.

JUDGMENT.

WRIT OF ERROR.

RE-DOCKETING.

See AMENDMENT, 1,

REPLEVIN.

See EVIDENCE.

RESCUE,

See CRIMINAL APPEAL.

REGISTRY.

In a memorial executed by the grantee of a deed, it is not necessary, to validate the registry, that such memorial contain the place of abode of the subscribing witness or witnesses to it. 8 G. 1, c. 15, only applies to deeds registered after the death of the grantee. Q. B. *O'Brien v. Tylee* 647

REGISTRATION.

See BURGESS.

REGISTRATION OF JUDGMENT.

See COSTS, 3, 4, 6, 7.

REGISTRY APPEALS.

1. Where a registry appeal does not state the point of law relied on, or insufficiently states it, the case will be remitted to the Assistant-Barrister. Ex. Ch. *O'Brien v. Hamilton* 454
2. The name of the claimant was *Robert Phayre*; the person rated in the Poor-law books as in occupation of the premises was the landlord John M'Donel, and the name on the list was *James Phayre*. It was sworn there was no other person of the name of Phayre in the borough but Robert Phayre. *Held*, that the name

of Robert Phayre not appearing on any list, and no notice of claim to register having been proved, the claimant was properly rejected. *Ex. Ch. Phayre v. M'Donel* 460

3. *Semble*—The Assistant-Barrister has no power under the statute to alter a Christian-name in the list. *Ibid*

4. The 13 & 14 *Vic. c. 69*, prescribes the time of holding Registry Sessions for 1851 between the 1st of January and 14th of February; the Assistant-Barrister signed the statement of facts and the appeal on the 15th of February. *Held*, that he had no jurisdiction, and that such appeal could not be entertained. *Ex. Ch. Agnew v. Fowler* 462

5. A rate being struck in a Poor-law Union in October 1849, the Guardians divided it into instalments, and by printed notices the rate-payers were apprised thereof, and receipts and check-books were issued to the collectors for the first instalment. In September 1850 the collectors required the rate-payers to pay all rates payable to the 31st of March 1850, and the first instalment was accordingly paid. In November 1850 the Guardians directed the payment of the second instalment. *Held*, that the first instalment was the only rate payable on the 31st of March 1850, and that the non-payment of the second instalment on that day did not disqualify the rate-payers being registered.—[*CRAMPTON, J., dissente*].—*Q. B. Beirne v. Clerk of Peace* 466

RENEWAL.

See COVENANT.

RENT.

See LEASE.

LODGMENT OF MONEY.

RENTCHARGE.

See PLEADING.

REJOINDER.

See PLEADING.

SECURITY.

REPLICATION.

See PLEADING.

SETTING ASIDE PROCEEDINGS.

RULE FOR JUDGMENT.

See JUDGMENT.

RETURN.

See MANDAMUS.

RAILWAY COMPANY.

SCIRE FACIAS.

See SERVICE OF PROCESS.

1. *Scire facias* to revive a judgment in ejectment, not to issue as of course under the 168th General Order. *E. Lessee Scully v. Ejector* 137
2. Where interest has been paid on a judgment up to the last gale day, the order to revive is absolute in the first instance. *E. Berkeley v. Newenham* 487
3. Order for *scire facias* to revive a judgment absolute, in the first instance, under the 169th New General Rule, where interest paid to last gale day. *Ibid*
4. A conditional order granted to revive a judgment in ejectment, there being less than a year's rent due, when the tenant was guilty of bad faith towards the landlord. *E. Lessee Scully v. Murphy* 534

SECURITY FOR COSTS.

1. The trustees of a legal estate being allowed to take defence to an ejectment, although not served, the Court will not, on the hearing of the application for permission so to do, make an order that they shall give security for costs; a substantive application must be made for that purpose. *Q. B. Anonymous* 140
2. Where a defendant entered a rule for *non pros.*, and the plaintiff obtained a rule to declare under the 50th General Order on payment of one pound costs, which the defendant accepted, *Held*, that the latter had waived his right to obtain security for costs. *C. P. Parke v. Parke* 632

SERVICE.

SERVANT.

See MASTER AND SERVANT.

SERVICE OF PROCESS,

See OUTLAWRY.

Where a defendant is resident in America, the Court deemed service on his wife, resident in this country, good service under the 171st General Order. Q. B. *Kidd v. Riddle* 85

Service of a summons will not be substituted on the attorney of a defendant, unless the attorney be engaged for him in a suit actually pending. Q. B. *Staunton v. Brownings* 88

Where service of *sci. fa.* cannot be effected in conformity with the 171st New General Order, the party may apply either to have service deemed good, or to substitute. E. *Executors Dodwell v. Carroll* 484

SET-OFF.

Rent due by the husband individually cannot be set-off against rent due to the husband in right of his wife. E. *O'Halloran v. Studdert* 245

SETTING ASIDE PROCEEDINGS.

See OUTLAWRY.

PLEADING.

1. Where a writ of summons required the defendant to cause an appearance to be entered for him in an action of debt, and the declaration grounded thereon was in assumpsit; this is but an irregularity, and the proceedings will be set aside on motion; but where the irregularity is waived by the defendant having taken a step in the cause, the motion will be refused with costs. Q. B. *Doyle v. Callanan* 1

2. A writ of summons issued requiring the defendant to enter an appearance to an action on a promissory note is irregular, in not stating the form of action, and will be set aside; but without costs. Q. B. *Duhig v. Lee* 83

3. A plea will be set aside if filed without the signature of Counsel. Q. B. *M'Nally v. Kearney* 84

SETTING ASIDE. 735

4. A replication set aside for irregularity, it not being entitled as of the day and year of filing, without costs. Q. B. *Watt v. Cooper* 85

5. A defence in ejectment will be set aside when a copy is not served with notice of the defence. Q. B. *Lessee Greer v. Ejector* 87

6. Where a plea bore date the 5th of February 1851, omitting the words "in the year of our Lord:"—*Held*, such omission was no ground for setting aside the plea for irregularity. Q. B. *Howard v. M'Nevin* 193

7. A defendant having entered and served the rule for judgment of non-pros., before the expiration of six months from the date of his appearance, may mark judgment pursuant thereto at any time within the year from the service of such rule. C. P. *O'Brien v. O'Kelly* 342

8. In an action for diverting a water-course a judgment by default set aside, the defendant undertaking to let the stream flow pending the action and without prejudice to it, as it did at the time of the diversion. E. *Kenyon v. Lindsay* 482

9. The declaration in ejectment, under 13 Vic. c. 18, should include the names of all persons served with the writ of summons. If an interlocutory judgment be marked against a defendant for whom a parliamentary appearance has been entered, but who has not been included in the declaration, such judgment is irregular and will be set aside. C. P. *Eyre v. Hallanan* 629

10. A judgment entered on a warrant of attorney will be set aside if the contract on which it was founded was for an interest in land and usurious. E. *Rhodes v. Baker* 488

11. Where a verdict is obtained by any misrepresentation affecting a material part of the case, it will be set aside, even though the misrepresentation was inadvertent. E. *Weldy v. O'Farrell* 667

SHERIFF.

See ARREST, 2, 3.

CAPIAS AD SATISFACIENDUM.

1. An irregularity in a bailable process, such as the omission to indorse the amount of bail, or to state by whom it was directed, or not giving the residence of the defendant, will not justify a Sheriff in not executing it, and is no cause against an attachment issuing against him. *Q. B. O'Rorke v. Kinsella* 496

2. Action against a Sheriff for a false return to a writ of *fi. fa.*—*Held*, the Sheriff not estopped from showing the writ to be unsealed, from having acted under said writ and returned goods on hands for want of buyers.

Held also, that the seal was essential.

E. Gallogly v. Ormsby 545

SLANDER.

See EVIDENCE.

PLEADING.

STAMP.

An instrument in writing made between landlord and tenant, and dated the 25th of July 1846, expressed that it was thereby agreed between the parties thereto that P. C. (the tenant) *is to have a lease* of the lands of B. for his own life at an acreable rent, payable half-yearly, the first payment to be made on the 29th of September then next, and that both parties should abide their costs of a pending ejectment. *Held*, that as the instrument could only operate as an agreement to grant a lease for the life of P. C., it was properly stamped with a 2s. 6d. stamp. *C. P. Lessee Watson v. Clooney* 58

Semble—The word "release" in the 8 & 9 Vic. c. 106, s. 3, seems to be a misprint for "lease." *Ibid*

STATUTES.

PARTICULAR STATUTES CITED AND COMMENTED ON.

52 *Hen.* 3, c. 23. Landlord and Tenant 208

4 <i>Hen.</i> 7, c. 20.	Fraud and Covin	599
10 <i>Car.</i> 1, c. 6.	Limitations	691
6 <i>Anne</i> , c. 10.	Double Pleading	601
11 <i>Anne</i> , c. 2.	Landlord and tenant	27, 238
7 <i>W.</i> 3, c. 12.	Statute of Frauds	348
9 <i>W.</i> 3, c. 10.	Suggestion of Breaches	489
10 <i>W.</i> 3, s. 6.	Ecclesiastical Law	557
4 <i>G.</i> 1, c. 5.	Landlord and Tenant	27
10 <i>G.</i> 1, c. 5.	Mines	114
15 <i>G.</i> 2, c. 10.	Mines	116
25 <i>G.</i> 2, c. 13.	Ejectment	61
28 <i>G.</i> 3, c. 31.	Bill of Exceptions	408
39 <i>G.</i> 3, c. 63.	Criminal Law	641
54 <i>G.</i> 3, c. 68.	Proctor	599
1 <i>G.</i> 4, c. 87.	Ejectment—Overholding tenants	331
9 <i>G.</i> 4, c. 14.	Statute of Limitations	691
9 <i>G.</i> 4, c. 54.	Criminal Law	100
9 <i>G.</i> 4, c. 55.	Criminal Law	100
10 <i>G.</i> 4, c. 56.	Friendly Societies	91
5 & 6 <i>W.</i> 4, c. 62.	Abolition of Oaths	198
6 & 7 <i>W.</i> 4, c. 93.	Burgess	144
6 & 7 <i>W.</i> 4, c. 111.	Criminal Law—Evidence	101
6 & 7 <i>W.</i> 4, c. 116.	Grand Jury	471, 669
1 <i>Vic.</i> c. 26.	Estate <i>pur autre vie</i>	348
1 & 2 <i>Vic.</i> c. 56.	Poor Law	76, 373
1 & 2 <i>Vic.</i> c. 101.	Slander—Justification	335
1 & 2 <i>Vic.</i> c. 106.	Assistant-Barrister—Appeal	77
1 & 2 <i>Vic.</i> , c. 109.	Tithe Rentcharge	239
2 <i>Vic.</i> c. 1.	Poor Law Amendment	78
3 & 4 <i>Vic.</i> c. 105.	Abolition of Arrest	25, 519
3 & 4 <i>Vic.</i> c. 107.	Insolvent Act	118, 624
3 & 4 <i>Vic.</i> c. 108.	Municipal Corporation	142, 620
6 & 7 <i>Vic.</i> c. 56.	Poor Law	77
6 & 7 <i>Vic.</i> c. 93.	Rating	144
8 & 9 <i>Vic.</i> c. 106.	Stamp	60
9 & 10 <i>Vic.</i> c. 64.	Interpleader	432
9 & 10 <i>Vic.</i> c. 111.	Landlord and Tenant	28, 322
10 <i>Vic.</i> c. 31.	Poor Law	335
11 & 12 <i>Vic.</i> c. 2.	Crime and Outrage	69

STATUTES.

11 & 12 Vic. c. 28.	Imprisonment for debt	141
11 & 12 Vic. c. 78.	Criminal Appeal	73, 102
12 Vic. c. 11.	Criminal Law	100
12 & 13 Vic. c. 16.	Justice of Peace	197
12 & 13 Vic. c. 77.	Incumbered Estates	41
13 & 14 Vic. c. 18.	Process and Practice	1, 65, 66, 83, 331, 352
13 & 14 Vic. c. 69.	Registration of Voters	454
13 & 14 Vic. c. 74.	Registry of Judgments	64

Local and Personal.

Railway Acts—1 & 2 Vic. c. 98 ; 7 & 8 Vic. c. 85.	29
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STAYING PROCEEDINGS.

1. Where judgment has been had in an ejectment for non-payment of rent by default and an *habere* issued, the defendant is not entitled to have the proceedings stayed on payment of the rent for which the ejectment was brought, and the costs. Q. B. *Lessee Taylor v. Ejector* 27
2. Where a defendant obtained an interpleader order, staying a plaintiff from proceeding in an action of trover for certain goods, on condition that these goods should be returned to plaintiff, and which were in pursuance of such order returned, the plaintiffs were restrained prosecuting another action for the non-delivery of these goods within a reasonable time. Q. B. *Leahy v. Malcomson* 432
3. A rule entered pursuant to the 135th General Order is irregular, if the affidavit of the facts has not been filed, previous to the entry of the rule. The plaintiff having served notice of trial, before the Consolidated Court of Nisi Prius, in a case which that Court was not authorised to try, and which was struck out by the Judge on that ground: *Semble*—The defendant was entitled to enter a

TROVER.

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rule under the 135th General Order, that the plaintiff should pay the costs of such notice of trial, and that the proceedings be stayed, the plaintiff not having proceeded to trial in pursuance of his notice. C. P. *Smith v. Waldron* 627

SUBLETTING.

See EJECTMENT.

SUBSTITUTION OF SERVICE.

See APPEARANCE.

SERVICE OF PROCESS.

SUGGESTION.

A party will not be permitted on the trial of a suggestion of breaches, to impeach the instrument on which it is grounded, on a charge of its being usurious. E. *Rhodes v. Baker* 488

SUMMONS.

See WRIT OF SUMMONS.

SURETY.

See BOND.

SURPLUSAGE.

See CRIMINAL LAW, 2.

SURRENDER.

See EVIDENCE.

LEASE.

TITHE RENTCHARGE.

See PLEADING.

TITLE.

See PLEADING.

TRESPASS.

See COVENANT.

EVIDENCE.

MASTER AND SERVANT.

PLEADING.

TRIAL.

See COSTS.

NOTICE OF TRIAL.

TROVER.

See EVIDENCE, 14.

PLEADING.

STAYING PROCEEDINGS.

TRUST.**TRUST.***See EVIDENCE.***TRUSTEE.***See NOTICE TO QUIT.***USURY.***See SETTING ASIDE PROCEEDINGS.***VARIANCE.***See DEMURRER.**EVIDENCE, 12, 21.**PLEADING.***VENIRE DE NOVO.***See JUDGMENT.***VENUE.**

1. In an action for tithe rentcharge by the administrator of an incumbent against the owner of the first estate of inheritance, the venue is transitory. *Q. B. Galway v. O'Meagher* 235

2. Application to change venue on special grounds cannot, under the 92nd New General Rule, be made until issue joined on all the pleas. *E. Lewis v. Walters* 486

VERDICT.*See AMENDMENT, 5.*

Where a verdict is obtained by any misrepresentation affecting a material part of the case, it will be set aside, even though the misrepresentation was inadvertent. *E. Weldy v. O'Farrell* 667

VOTING.*See QUO WARRANTO.***WAIVER.***See IRREGULARITY.**SECURITY FOR COSTS.***WARRANT OF ATTORNEY.***See SETTING ASIDE PROCEEDINGS.*

A judgment entered on a warrant of attorney will be set aside when the contract on which it was founded was usurious. *E. Rhodes v. Baker* 488

WARRANTY.*See POLICY OF INSURANCE.***WILL.****WASTE.***See COVENANT.*

Semble—Fire not occasioned by negligence is not waste; and where an injury is merely the result of accident, without neglect, the waste therefrom resulting is not permissive. *Q. B. White v. McCann* 205

WILL.

A testator, seized *pur autre vie* of a moiety of the lands of M., with a covenant for perpetual renewal, devised "one third undivided part of his freehold in the said M.," together with other lands, "to his son George for ever, with power to him to bequeath the same to his lawful heirs male or female in such proportions as he should think proper, thereby however binding and obliging him to leave one-half of his said lands to his present children by his late wife, or to the survivors or survivor of them, in such divisions or shares as he should please." He then devised another one-third to his son Joseph in similar terms, and the remaining one-third to his wife Elizabeth during her life; and if his son John should marry a Protestant, he bequeathed to him the said one-third part of the above lands after the death of his mother, for ever, with full power for him to give or leave the same to his lawful heirs male or female in such shares as he should think proper; and if any one or more of his said three sons should die without leaving lawful issue, his or their third parts should go to the surviving brothers or brother, and their lawful issue as above; and if all his said three sons should die without lawful issue, that all the said lands should go to his daughter J. F. and her issue for ever. The will contained a bequest of twelve guineas to J. F., to be paid within a year after her mother's death equally by her three brothers; and also the following clause:—"As my son George or Joseph might possibly, by the influence of a second wife, make a long

lease at a low rent to or in trust for the children of such second wife, of that half of the land which I intend should be a provision for their present children by their first wife, my will is that one-half of the land shall go to their present respective children, the survivors and survivor of them, free, clear and discharged of all debts, incumbrances or leases above seven years from their deaths."

Held, that George Mahon took an estate for life in one-sixth of the lands of M., with remainder to his children living at the date of the will, for their lives, subject to a power of distribution by George, with remainder to George in *quasi* tail, and that he took an immediate estate in *quasi* tail in another one-third. That Elizabeth, the testator's widow, took an estate for life in another one-third, with remainder to the testator's son John in *quasi* tail, with remainder to the testator's sons George and Joseph as tenants in common in *quasi* tail, with cross remainders between them, with remainder to J. F. in *quasi* tail, and that Joseph took an estate in *quasi* tail in the remaining one-third. C. P. *In re Mahon* 567

R. B. by his will limited an estate to J. B. and S. B. for their lives as tenants in common, with remainder, on the death of either, to the other for life: the will then contained a devise to trustees to preserve contingent remainders, and after the death of the survivor of them the said J. B. and S. B., the devise was "to permit and suffer the lawful issue male of said J. B. and S. B., or the lawful issue male of one of them, in case the other shall have no issue at the time of his decease, to take and receive the rents, issues and profits of the said premises share and share alike during their respective natural lives; and in case of no issue male of either of them living at the death of the survivor of them, then to permit the issue female of them and each of them, during their natural lives, to receive the rents,

issues and profits thereof share and share alike."

The will then contained a power, enabling J. B. and S. B., or the survivor of them, or the heirs male of such survivor, to make leases of the premises, and then followed these words: "provided and in case the said J. B. and S. B. shall both die without leaving any issue male or female of them or either of them living at the time of the death of the survivor of them, then and in such case I devise the same to D. B. and B., S. share and share alike for ever."

Held, that the words "issue male" meant "heirs male," and that S. B. took an estate tail under the will. Ex. Ch. *Blackwell v. Hale* 612

A, being seised of estates held in fee-simple and for lives, devised all his real and freehold estates, subject as to one denomination to certain annuities, to his son B. and to *his issue male and female* in such shares, manner and proportions as he might by deed or will appoint, with power to jointure a wife; and in case of the death of B. without lawful issue, then he devised all his said real and freehold estates to his three daughters equally share and share alike as tenants in common and not as joint tenants, and to their heirs and assigns. *Held*, that B. took an estate tail in the fee-simple lands and in *quasi* tail in the freeholds for lives. C. P. *Ex parte Whitsitt* 633

WITNESS.

See EVIDENCE, 13.

WRIT.

See AMENDMENT, 2, 3, 4.

CAPIAS AD SATISFACIENDUM.

WRIT OF ERROR.

1. *Semble*—When a writ of error lies, the Court of Criminal Appeal has no jurisdiction. Cr. Ap. *The Queen v. Byrne* 100

2. Where there is an allegation of diminution in a record on which a writ of error is about being brought, the proper course is to issue the writ of error and obtain a *certiorari* to return the record, and on return thereof to allege diminution, if the part sought to be inserted be omitted. Q. B. *Evans' Charities v. Bank of Ireland* 394

3. Where a trial was had, and a bill of exceptions taken to the charge of the Judge, which exceptions were al-

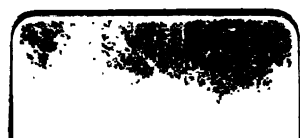
lowed, and a *venire de novo* awarded, and a second trial had, and a verdict found in favour of the exceptants; on a writ of error issued, these proceedings were omitted on the record; *Held*, that the plaintiff in error was entitled to a *certiorari*, to have these matters returned as part of the record. Ex. Ch. *Ibid* 396

WRIT OF SUMMONS.

Sec AMENDMENT.

SETTING ASIDE PROCEEDINGS,
1, 2.





the 1990s, the number of people with a mental health problem has increased by 50% (Mental Health Foundation 1999). The prevalence of mental health problems has increased in the general population, and the incidence of mental health problems has increased in the prison population (Mental Health Foundation 1999).

There is a growing awareness of the need to address the mental health needs of prisoners. The Department of Health (2000) has published a strategy for mental health services, which includes a commitment to improve the mental health of prisoners. The Department of Health (2000) has also published a strategy for mental health services, which includes a commitment to improve the mental health of prisoners.

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